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In the Supreme Court of the United States

OCTOBER TERM, 1925

No. —

FEDERAL TRADE COMMISSION, PETITIONER

v.

AMERICAN TOBACCO COMPANY, RESPONDENT

*PETITION FOR WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE SECOND
CIRCUIT*

The Solicitor General and the Chief Counsel of the Federal Trade Commission, on behalf of the Commission, pray that a writ of certiorari issue to review a judgment of the United States Circuit Court of Appeals for the Second Circuit, entered on the 27th day of October, 1925, which set aside an order of the Federal Trade Commission entered against the American Tobacco Company and others on the 16th day of February, A. D. 1924.

STATEMENT

On the 29th day of May, 1922, the Commission issued a complaint against certain named wholesalers of tobacco, cigars, and cigarettes, members

of an unincorporated association styling themselves Wholesale Tobacco and Cigar Dealers Association of Philadelphia, Pa., and certain of the great tobacco-manufacturing companies, charging the wholesalers, in effect, with combining and conspiring together to fix the prices at which wholesalers in the Philadelphia district should sell tobacco and tobacco products and to prevent wholesalers who did not maintain the prices agreed upon from purchasing goods; and charging the tobacco-manufacturing companies with aiding and abetting the observation of the prices thus fixed, both by members of the association and by nonmembers, by agreeing to refuse and refusing to sell their products to any wholesaler selling at less than the agreed prices. The members of the association and the tobacco companies answered, and after testimony was taken the Commission made its findings and entered an order against the wholesalers and the American Tobacco Company, the complaint being dismissed as against the Lorillard company, which had also been named as a party. The wholesalers reported that they were complying and would continue to comply with the Commission's order, but the American Tobacco Company applied to the Circuit Court of Appeals for the Second Circuit to review the proceedings. In due time the case came on for argument and the court set the Commission's order aside.

THE FACTS

On August 5, 1920, all the wholesale tobacco and cigarette dealers in Philadelphia, Pennsylvania, and Camden, New Jersey, except two, organized an association, the declared purpose of which was "to correct any abuses as may exist in the conduct of the trade by its various members." On September 16, following, the Association adopted a resolution that "cash discounts on tobacco and cigarettes be not more than 8%." (Commission's Exhibit 1.) The Executive Committee was requested to notify all members not in attendance of the discounts adopted by the Association. (Commission's Exhibit 1.) In explanation of this method of fixing prices it should be stated that the large tobacco companies issue price lists on their goods which they distribute to the wholesalers and jobbers and make their own prices to such customers based on a discount from these lists. The jobbers use these same lists in reselling, and their agreement therefore to sell tobacco and cigarettes at 8% off the list fixes a uniform price at which the members would sell tobacco and cigarettes. On June 20, 1921, prices were increased by reducing the discount from list from 8% to 7% (Commission's Exhibits 4 and 5, R. 1236-37.)

Having agreed upon the prices to be charged by the members, the Association cast about for means of compelling members to observe the prices, of inducing and compelling those outside the Associa-

tion to become members and thus become parties to the agreement, and of inducing and compelling wholesalers not members to maintain Association prices. It was apparent that if the great tobacco manufacturing companies, whose products comprised practically all of the tobacco dealt in by the wholesalers, would join with the members of the Association, all three of these ends would be accomplished. By the simple expedient of the manufacturers refusing to sell further to price cutters or to those who did not join the Association, recalcitrants could be brought into line or forced out of business. Accordingly negotiations were entered into by the Association with certain of the large tobacco companies. The Commission found that the " American Tobacco Company knew of the price agreements made by the Association and its members * * * and agreed with the said Association and its members to help them maintain the price agreements " (Rec. 1354).

The Association employed an agent to detect price cutting by members of the Association as well as those not members of the Association. Dealers who would not maintain agreed prices were reported to the American Tobacco Company, who discontinued sales to them until they agreed to maintain prices or definitely and finally declined to sell them further. Murphy Brothers, members of the Association, were reported to the American Tobacco Company, which declined to sell them any

goods from September 2, 1921, to October 4, 1921 (Commission's Exhibit 20, R. 418; Exhibit 21, R. 419). Charles Seider, another wholesaler, was dropped by the American Tobacco Company from its list of customers "for selling merchants in Philadelphia at less than the prices in effect here by this group of jobbers." (R. 693.) Shipments to V. Fermani and one Blumenthal, other price cutters, were also held up by the American Tobacco Company because of reports made to it by officers of the Association upon information furnished to them by their investigator. (R. 696-698.)

The effect of the combination of the Philadelphia jobbers and the American Tobacco Company was to suppress and eliminate price competition among both members of the Association and non-members (R. 131-132, 159-60, 246-248, 250-251, 300-301, 303-311, 313, 374-375). The holding of the Court below is shown by the

QUESTIONS PRESENTED

Paragraph One: Is the Commission's finding that the American Tobacco Company agreed with the members of the Philadelphia Association to decline to sell its products to any jobber who did not maintain the prices agreed upon by the jobbers, supported by evidence? The Court below held that it was not.

Paragraph Two: Was it lawful for the American Tobacco Company, with full knowledge of the illegal agreement of the jobbers to fix prices at

which they would sell and to prevent jobbers who sold at less than these prices from getting the goods, actively to aid and abet the jobbers in making effective their illegal agreement? As we understand the opinion, the Court below held that such action was lawful.

Paragraph Three: Is it an unfair method of competition for the members of a jobbing association to agree to fix prices at which they will sell and to prevent both members of the Association and nonmembers who do not observe the agreed prices from procuring the goods? The Court below appears to be of opinion that it is not.

Paragraph Four: Is it an unfair method of competition for a manufacturer to join with a jobbers' association in compelling its members to observe prices illegally agreed upon and in preventing jobbers who do not observe the price from procuring the manufacturer's goods? The Court below held that it is not.

Paragraph Five: Is it an unfair method of competition for jobbers to sell goods at prices satisfactory to themselves and which in the past have sustained their business, though such prices may be lower than those agreed upon by the members of an association of competing jobbers? The Court held that it is. Conversely, is it fair competition for jobbers to combine to coerce competitors into charging prices which they have agreed upon as satisfactory to themselves? The Court held that it is.

Paragraph Six: May a combination in restraint of interstate commerce in violation of the Sherman Act amount also to an unfair method of competition within the meaning of the Federal Trade Commission Act? The Court appears to be of opinion that the two acts cover entirely different fields.

Paragraph Seven: Must the Commission in each case allege in its complaint that a proceeding is to the interest of the public, introduce evidence to prove the allegation and make a finding of fact that the proceeding is to the interest of the public, as a condition precedent to entering a valid order to cease and desist under the statute? The Court intimates in this case that it must do so, and in a previous case definitely held that it must.

Paragraph Eight: Is it to the interest of the public to prevent jobbers from agreeing upon prices at which they will sell and from agreeing to prevent those who will not observe their prices from getting the goods, even though no evidence be adduced that the increased prices of the jobbers are passed on to the consumer through increased prices of the retailer? The Court below appears to be of opinion that a proceeding for this purpose is not to the interest of the public.

REASONS FOR THE ISSUANCE OF THE WRIT

As the questions above stated show, the opinion of the Court casts doubt upon the construction heretofore entertained of various phases of the Trade

Commission Act, and, in one respect, of the Sherman Law.

The Court set aside the order of the Commission on the ground that there was no evidence to support it. We believe that there was not only substantial evidence to support the finding, but the evidence stated by the Court as adverse to the finding was not necessarily contrary to that upon which the finding was based. As the finding was supported by substantial evidence, the action of the Court was clearly unwarranted and should be reversed.

The Court appears to be of opinion that acts which violate the Sherman Law are not an unfair method of competition. It has been supposed since the decision of this Court in the Gratz and Beech-Nut cases that practices having a dangerous tendency unduly to hinder competition were unfair methods of competition even though their use might also violate the Sherman Law. There was no intimation in the Beech-Nut case that if the use of a system of express contracts between the manufacturer and dealers to maintain resale prices had been admitted, the Beech-Nut Company would not have been guilty of the use of unfair methods of competition. On the contrary, both the opinion of the Court and the dissenting opinion by Justice McReynolds indicate that a violation of the Trade Commission Act would have been proven. The decision in this case is, therefore, it is urged, con-

trary to the decision of the Court in the Beech-Nut case.

Similarly, various Courts of Appeals have held that a combination of jobbers or other dealers to prevent competitors from securing goods by threat of boycott is an unfair method of competition (*National Harness Manufacturers' Association v. Federal Trade Commission*, 268 Fed. 705; *Wholesale Grocers Association of El Paso, Texas, v. Federal Trade Commission*, 277 Fed. 657; *Western Sugar Refinery Company v. Federal Trade Commission*, 275 Fed. 725; *Southern Hardware Jobbers' Association v. Federal Trade Commission*, 290 Fed. 773). Certainly such a combination is in violation of the Sherman law (*Eastern States Retail Lumber Dealers' Association v. United States*, 234 U. S. 600). The opinion of this Court in the *Federal Trade Commission v. Raymond Bros.-Clark Company* (263 U. S. 565), appears to be in accord with these decisions and contrary to that of the Court below in the instant case.

While not expressly holding in this case that the Commission must allege, prove, and find that the proceedings is to the interest of the public, the Court clearly intimates that it must; and in a previous case (*John Bené & Sons, Inc. v. Federal Trade Commission*, 299 Fed. 468) the same Court squarely held that there must be allegation and proof of public interest and set aside an order of the Commission on the ground that there was not

proof "of its being to the interest of the public that this proceeding should have been begun or the order complained of made." The Commission has been of opinion since its organization that Section 5 of the Trade Commission Act conferred upon it absolute discretion to determine whether it would institute a proceeding. Nothing in the decisions of this Court in the cases which have come before it has even intimated the contrary.

The decision also indicates, without positively deciding, that the test of public interest is the *direct pecuniary injury* to the purchasing public. This is found in the Court's suggestion that there is no public interest in a proceeding to prevent combinations by jobbers to fix prices at which they will sell, since it is not proven that the increased prices of the jobbers are reflected in the retailers' prices. The suggestion of such a test for public interest in a proceeding under a statute intended to preserve free competition is, we believe, quite novel and legally unsound (*Dr. Miles Medical Co. v. Park & Sons*, 220 U. S. 373).

The Court also appears to be of opinion that a combination between a manufacturer and jobbers handling his goods to fix resale prices would not violate the Sherman Law. The Court distinguishes the case of *Dr. Miles Medical Company v. John D. Park & Sons Company*, *supra*, on the ground that in that case the prices of retailers, as well as wholesalers, were fixed. The Court also distinguishes the instant case from the Beech-Nut case on the same ground.

It is now more than ten years since the Trade Commission was organized and entered upon the administration of the Trade Commission Act and those sections of the Clayton Act which it is charged with enforcing. Questions with respect to procedure as well as those involving the interpretation of the substantive law of the Trade Commission Act, such as those found in the opinion of the Court below, ought to be authoritatively settled by this Court. Moreover, the Second Judicial Circuit includes the City of New York, the greatest commercial center of the country, and many more petitions to set aside orders of the Commission are filed in that circuit than in any other circuit with the exception of the Seventh Circuit which includes Chicago. The decisions of these circuits, therefore, in large measure fix the interpretation of the Act and of the procedure thereunder. Where, as in this case, the decision of these circuits are on important points and appear to be at variance with those of this Court and well-considered opinions of other circuits, they should be reviewed by this Court and the law settled.

WILLIAM D. MITCHELL,

Solicitor General.

BAYARD T. HAINER,

Chief Counsel, Federal Trade Commission.

JANUARY, 1926.

BRIEF

OPINION OF THE CIRCUIT COURT OF APPEALS

The opinion in this case has not yet appeared in the Federal Reporter. It will be found at pages 43-66 of the printed transcript. (R. III.)

GROUND8 OF JURISDICTION

This was a petition to the Circuit Court of Appeals for the Second Circuit to review and set aside an order of the Federal Trade Commission entered under authority of Section 5 of "An Act To create a Federal Trade Commission, to define its powers and duties, and for other purposes" (38 Stat. 717). The jurisdiction of the Court below was invoked under authority of Section 5 of that Act.

The Court below reversed the Commission's order on October 27, 1925. (R. III, p. 67.)

The jurisdiction of this Court is invoked under Section 5 (paragraphs 4 and 5) of the Federal Trade Commission Act (38 Stat. 717), and under Section 240 of the Judicial Code, as amended by the Act of February 13, 1925. (*Federal Trade Commission v. Gratz et al.*, 253 U. S. 421.)

ERRORS TO BE URGED

The errors to be urged have been set forth in the petition (*supra*, pp. 5-7).

Members of the Wholesale Association agreed upon prices to be charged by them

It is proven beyond question by the minutes of the wholesalers association that they agreed upon prices to be charged by them and sought, by the means related in the statement of facts (*supra* pp. 3-5), to deprive any wholesaler of tobacco or tobacco products who sold at less than the agreed prices. The Court below, while not directly passing upon this question, apparently concedes it (*infra*, p. 22). If at any time after the formation of the combination or conspiracy of wholesalers the American Tobacco Company became a party thereto, or assisted in furthering its purposes, the Commission's order against it was well founded.

If the unlawful acts were in pursuance of a conspiracy, and were committed before the unlawful conspiracy had been abandoned, or the object of the conspiracy completed, all persons who were members of the conspiracy or made themselves parties thereto at any time before the conspiracy had been abandoned, or its object completed, are responsible. (*United Mine Workers v. Coronado Coal Company*, 258 Fed. 829, 838; in support citing *Thomas v. U. S.*, 156 Fed. 897, 910; *Smith v. U. S.*, 157 Fed. 721, 728; *Goldfield Consolidated Mines Co. v. Goldfield Miners Union*, 159 Fed. 524.)

In other words, where an unlawful end is sought to be effected, and two or more persons, actuated by the common purpose of accomplishing that end, work together, in any way, in furtherance of the unlawful

scheme, every one of said persons becomes a member of the conspiracy, although the part he was to take therein was a subordinate one, or was to be executed at a remote distance from the other conspirators. (*U. S. v. Cassidy*, 67 Fed. 698-702. See also *Eastman Kodak Co. v. Blackmore*, 277 Fed. 694.)

The Commission's finding that the Tobacco company agreed to help the members of the association to enforce their price agreement, thereby becoming a party to the conspiracy, as well as its finding of cooperation between the American Company and the association to maintain the agreed prices, is supported by substantial evidence.

As to the American Tobacco Company, there are involved under the complaint and the Commission's findings essentially two propositions, as follows:

(1) An agreement by the American Tobacco Company with the group of jobbers named in the complaint to assist in the maintenance of such resale prices.

(2) Cooperation by the American Tobacco Company with this group of jobbers in maintaining resale prices fixed by said jobbers:

The Commission found that the American Tobacco Company knew of the price agreements made by the Association with its members and agreed with the said Association to help them to maintain their price agreements. (R. p. 1354.) This finding

is amply supported by the testimony. The president and treasurer, respectively, of the Jobbers' Association, shortly after the said Association fixed a uniform resale price, went to New York for the purpose of securing the assistance of the American Tobacco Company in the maintenance of the uniform prices. (R. 654.) The following portions of the record, which quote the testimony of Mr. Hill, justify, we submit, the finding of the Commission that the American Tobacco Company agreed with the Association to help it maintain its discounts:

Q. Did you say, however, to Mr. Eberbach and to Mr. Krull, or to either one of them, that you would assist them and other Philadelphia jobbers so that they may be selling under a discount satisfactory to them?

A. I don't know just what form that took.

Q. Now tell us what you did say to them.

A. I can not tell, of course, what I did say, but I probably said that we would cooperate with the jobber not being able to sell goods at a profit. (R. 778-779.)

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Q. And after your circular, and after your instructions were issued to your field men, did you tell jobbers who visited you that you would cooperate with them in seeing to it that they would be able to sell at the discounts prevailing in their territory?

A. I think the conversation usually took that form, that we would be glad to help you to maintain——

Q. The customary price?

A. No; a satisfactory condition. (R. pp. 779-80.)

Q. So, continuing to be specific, did not you say to Mr. Eberbach and to Mr. Krull, or to either of them, that you would assist them, or cooperate with them, in selling at a discount of not greater than eight per cent?

A. I certainly did not.

Q. What did you say?

A. The most—of course, I am not repeating recollection of a conversation—but the most that I said to either of those gentlemen, or anyone else, was that we would assist them in securing a satisfactory profit on the goods.

Q. Now, the word "satisfactory" is the one word we seem to be at odds about. When you use the word "satisfactory," do you mean satisfactory to the jobber?

A. Satisfactory to the American Tobacco Company.

Q. What do you say as to the jobber?

A. If it is satisfactory to the American Tobacco Company, it is satisfactory to the jobber. (R. pp. 781-82.)

While there is abundant testimony from which it is proper to draw the conclusion that the American Tobacco Company did agree to help the Association maintain its discounts, this proof, we submit, makes it quite unnecessary to point out the numerous places in the record which themselves would justify the finding as to the agreement. The evidence of cooperation between the Company and

the Association stated below contains circumstantial evidence which would fully justify a finding of combination and agreement if there were no direct evidence to sustain it.

The evidence at least establishes conscious cooperation and concert of action between the American Tobacco Co. and the Association to maintain the agreed prices and to prevent any jobbers who cut these prices from purchasing the Tobacco Company's products

So much for the agreement found by the Commission to have been made between the Association **and the American Tobacco Company.** This leaves the other of the two essential propositions involved as to the Company, viz, its cooperation with the Association in the maintenance of the Association's discounts.

If the evidence does not support a finding of agreement on the part of the tobacco company to aid and abet the members of the Association in carrying out their price agreement by cutting off jobbers who did not maintain the prices, it establishes cooperation and concert of action between the tobacco company and the jobbers to accomplish this purpose, which brings the Company conduct within the decision of this court in the Beech-Nut case. There it was expressly stipulated that there were no contracts, express or implied, which bound the dealers to maintain the prices on Beech-Nut products, made by the Company. This Court

nevertheless held that there was conscious cooperation and concert of action between the Company and dealers handling its products to prevent dealers who did not observe these prices from procuring the goods and that such cooperative methods, having the effect to substantially lessen competition, violated the Trade Commission Act.

The Commission found that the members of the Association:

Sought and secured the cooperation of the American Tobacco Company in such persuasion and intimidation, which said American Tobacco Company rendered by notifying its trade in the territory of the members, by circular letters and otherwise, that the notifier would refuse to furnish further supplies of its products to any wholesale dealer who failed to resell such products at the prices fixed in the aforesaid letter or implying the same in veiled language.

Caused reports of the names of said dealers who failed to maintain said resale prices to be reported by the members and their salesmen, either directly to the association or through the respective members, in each instance, to the association, and, upon receiving such reports, in turn reported the names of such offending dealers to the American Tobacco Company, requesting its assistance in the enforcement of said system by having said American Tobacco Company refuse to further supply said offending dealers with any of its products. * * *

Said American Tobacco Company knew of the price agreements made between association and its members * * * and agreed with the said association and its members to help them maintain the price agreements described in Paragraph Two hereof. (R. 1352-1354.)

The evidence supports these findings.

Shortly after the Philadelphia Association established the uniform discounts, the American Tobacco Company issued a circular letter (Com. Ex. No. 10, R. 1241). It was, in effect, a threat to remove price-cutting distributors from its direct list. Tobacco products are sold to the retail trade, and have been sold for many years, at different discounts in various sections of the country. The prevailing discount in one territory is not the same as in other territories; consequently, the circular of the Company meant that the Company would consider as a price-cutter any of its distributors who sold at a higher rate of discount than was generally prevailing in his territory. There were, of course, many sections of the country where there was no prevailing discount; consequently the circular had a different application to territories where there was a prevailing rate of discount from that which it had to territories where there was no discount that was looked upon as the customary discount. As to those where there was a prevailing discount, the circular meant that the Company would consider as a price-cutter anyone who cut

below the prevailing discount. This meant that no matter how these prevailing rates of discounts had been established, even though they might have been established by price-fixing agreements among the jobbers, such as in Philadelphia, the American Tobacco Company would assist in the maintenance of these discounts. As to territories where there was no discount which might be looked upon as the customary or prevailing discount, the circular was an invitation to distributors of the American Tobacco Company to fix customary or prevailing discounts, which when fixed would be enforced by the Company.

The circular was the open announcement of the policy which had been previously decided upon by the Company. This is evident from a letter written by the vice president of the Company to a jobber in Minneapolis (R. 1261-1264) as follows:

We feel very definitely here, that when jobbers have cooperated and have held such conferences as Mr. Hill has suggested, then the manufacturers can step in by refusing shipments or withholding orders from the demoralizers, and thereby assist those legitimate jobbers who desire to make a profit.

O'Boyle, Field Sales Manager of the American Tobacco Company for the Philadelphia territory, testified that parts of this letter described the relation of his company to the activities of the Philadelphia jobbers. He says:

However, if any such conferences were held and it was agreed that the merchandise

should be sold at a price, then the last part of this letter was the policy in effect: "then the manufacturers can step in by refusing shipments or withholding orders from the demoralizers, and thereby assist those legitimate jobbers who desire to make a profit." (Rec. p. 692.)

This cooperation was of the most thorough and effective nature. The Association employed an investigator whose duty it was to find out if any of its members were cutting prices. This investigator reported to the president of the Association, who, in turn, entered complaints with the American Tobacco Company. These complaints were thereupon investigated by the Company, and the record shows, and the Commission found, two outstanding instances of the cooperation charged in the complaint between the Company and the Association. One of these was the cutting off by the American Tobacco Company from its direct list of Charles Seider, who had refused to join the Association and who had refused to maintain its discounts. The proof is direct, positive, and convincing that Seider was cut off by the American Tobacco Company solely because he sold at prices less than those agreed upon by the Association, although the discounts which he was then allowing were no greater than those he had been allowing for thirty years or more. The other outstanding instance is the cutting off by the American Tobacco Company of Murphy Brothers. They also were

cutting prices, and they, as well as Seider, after having been complained against by the Association to the Company, were investigated by the American Tobacco Company. The result of the investigation showed that Murphy Brothers were selling at discounts greater than those fixed by the Association, and the American Tobacco Company removed Murphy Brothers from its direct list.

Two other jobbers, both members of the Association, were suspected of cutting prices, but the charge was not established. While they were not permanently cut off by the American Tobacco Company, their shipments of that Company's goods were delayed. This delay was in the nature of a warning to those jobbers to cease price-cutting, and the record shows that those jobbers heeded the warning.

It appears that the Court admits these facts as it says in the opinion:

It [The American Tobacco Co.] simply would not sell to any wholesaler or jobber in the Philadelphia territory if it found that he was selling to the retailer at a price less than that fixed by the Wholesale Tobacco and Cigar Dealers Association of Philadelphia

In other words its policy was to uphold and support the prices of its products as fixed in a particular locality by the wholesalers or jobbers therein.

These statements by the Court necessarily imply knowledge of an illegal agreement to fix prices.

This is not a case where a manufacturer himself suggests resale prices, which he has a lawful right to do, and upon learning that a dealer does not maintain those prices declines to sell him further. Here the jobbers, clearly in violation of the Sherman Law, agree upon prices at which they will sell, and the American Tobacco Company, being fully advised of that agreement and being charged with knowledge of its illegality, nevertheless aids and abets its performance.

The combination of the wholesalers to fix prices at which they will sell and to prevent, through concert of action with the American Tobacco Company, competing wholesalers who did not observe those prices, from securing goods was an unfair method of competition.

It is submitted that both the agreement among **the wholesalers to fix prices and their action to prevent competitors who did not observe the prices** from buying goods amounted to unfair methods of competition.

In the Gratz and Beech-Nut cases (*F. T. C. v. Gratz*, 253 U. S. 421; *F. T. C. v. Beech-Nut Packing Co.*, 257 U. S. 441) this court held that practices which have a dangerous tendency unduly to hinder competition are unfair. In the latter case it was urged that the Beech-Nut Company's cooperation with dealers to fix resale prices could not be an unfair method of competition since it did not adversely affect competing manufacturers. But this Court held the methods employed to be unfair, be-

cause of their effect to eliminate competition between retail dealers. It is contended, therefore, that methods of competition which are unfair to the public because of their effect to suppress competition are within the prohibition of the Act. A combination among wholesalers to fix prices is certainly a method of competition, and because of its effect to eliminate competition is unfair.

That a combination of jobbers to compel other jobbers against their will to maintain prices fixed by their competitors on pain of having their supplies of goods cut off is an unfair method of competition would appear to be beyond question. It places a direct restraint upon competitors' freedom to trade as they will, to make such prices in their business as may be satisfactory to them and as may be justified by their cost of doing business and by other conditions surrounding their business. Combinations to prevent dealers who do not maintain prices satisfactory to their competitors from procuring goods, by threatening boycott of manufacturers who sell to them, have repeatedly been held to be unfair methods of competition within the meaning of the Federal Trade Commission Act. (*National Harness Manufacturers Association v. F. T. C.*, 268 Fed. 705; *Western Sugar Refinery Company v. F. T. C.*, 275 Fed. 725; *Wholesale Grocers Association of El Paso, Texas, v. F. T. C.*, 277 Fed. 657; *Southern Hardware Jobbers Ass'n v. F. T. C.*, 290 Fed. 773; *F. T. C. v. Raymond Bros.-Clark Co.*, 263 U. S. 565.)

If, instead of employing the boycott to prevent manufacturers from selling to objectionable wholesalers a combination is formed with the manufacturers by which they become active participants in a conspiracy to compel wholesalers to maintain prices or be deprived of the goods, it would appear just as clearly a direct restraint upon the wholesalers' trade and an unfair method of competition.

While a manufacturer is not a competitor of the wholesaler handling his goods, it is submitted that where a manufacturer becomes a party to a combination of wholesalers and acts in concert with them to coerce the competitors of the wholesalers to maintain prices satisfactory to the combination, he is chargeable with the use of unfair methods of competition both against the wholesalers whose trade is restrained and against the public who is entitled to free and fair competition.

It is no defense of the conduct of either the manufacturer or of the dealers that they believed it to be to their advantage to enter the combination. In the *Miles Medical case* (*Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U. S. 373, 407) this Court says:

If there be an advantage to a manufacturer in the maintenance of fixed retail prices, the question remains whether it is one which he is entitled to secure by agreements restricting the freedom of trade on the part of dealers who own what they sell. As to this, the complainant can fare no better with its plan of identical contracts than

could the dealers themselves if they formed a combination and endeavored to establish the same restrictions, and thus to achieve the same result, by agreement with each other. If the immediate advantage they would thus obtain would not be sufficient to sustain such a direct agreement, the asserted ulterior benefit to the complainant can not be regarded as sufficient to support its system.

But agreements or combinations between dealers, having for their sole purpose the destruction of competition and the fixing of prices, are injurious to the public interest and void. They are not saved by the advantages which the participants expect to derive from the enhanced price to the consumer.

It is not an unfair method of competition for jobbers to sell goods at prices satisfactory to themselves, though these prices may be lower than their competitors may desire.

It would appear to be the essence of fair competition that each wholesaler should be permitted to sell goods at such prices as in his judgment will best advance his business. If a wholesaler has lower cost of doing business than his competitors, due to facts peculiar to his own business, such as advantageous investment in plant, favorable location, efficient management and organization, he is entitled to seek to increase his volume of business and further reduce his costs by making lower prices than can be made by others less efficient or in other re-

spects less fortunate. The public also, it would appear, is entitled to have the benefit of such lower prices as the wholesaler is willing to make. In the instant case the wholesalers who were cut off or compelled to charge the prices agreed upon by the members of the Association had been in business for years and had survived upon prices made by them. There is no evidence in the record to show that their prices would not show them a profit, or that they were seeking to destroy competition by selling at less than cost. This was not a case of predatory price-cutting to destroy competition. As a matter of fact, they were the less important wholesalers and were not financially capable of undertaking any such price-cutting campaign. On the other hand, it affirmatively appears that the associated jobbers were demanding that they charge such prices as would insure not themselves but their competitors what those competitors considered "a fair or legitimate profit" or "a fair and reasonable profit." Does the Court below mean that in a given case it will determine what is a fair and reasonable profit and whether a dealer is reducing prices to a point that does not show such a profit to his competitor? We had not supposed that the Courts would or could do this, since it would require them to determine what prices are reasonable and is tantamount to fixing prices. This we understood from the decisions, the Courts did

not assume to do. In *U. S. v. Addyston Pipe and Steel Co.* (85 Fed. 271, 283), Judge Taft says:

It is true that there are some cases in which the courts, mistaking, as we conceive, the proper limits of the relaxation of the rules for determining the unreasonableness of restraints of trade, have set sail on a sea of doubt, and have assumed the power to say, in respect to contracts which have no other purpose and no other consideration on either side than the mutual restraint of the parties, how much restraint of competition is in the public interest and how much is not.

Upon reaching this Court the case was affirmed, this Court saying:

We do not think the issue an important one, because, already stated, we do not think that at common law there is any question of reasonableness open to the courts with reference to such a contract (175 U. S. 211, 238).

Again in *Park and Sons v. Hartman* (153 Fed. 24, 45), Judge Lurton says:

It is not answer to such restrictive covenants that after all they only prevent injurious competition between such dealers and only result in maintenance of reasonable prices. These are not the tests by which the validity of such agreements are determined.

Or, if the Court does not claim the right to make this determination, will it leave it to the traders to determine, in combination and agreement, what

prices are reasonable? We had supposed that this was clearly unlawful and that in law a reasonable price was such a price as could be had in free and fair competition in an open market. And yet the question of reasonable profit must be determined either by the Court or by the parties if the dealer is to be held as for unfair competition when he sells at prices which do not show his competitors a "fair and legitimate profit." If, as we believe, every dealer had the right to sell at prices satisfactory to himself, barring illegal discrimination in such prices, then it is clear that competitors can not lawfully combine among themselves and with manufacturers to coerce dealers to sell at prices satisfactory to others.

But the Court seeks to sustain its position in this regard and to escape from the reasoning of the decisions which we have cited by asserting that the Trade Commission is not authorized to determine whether the Sherman Law has been violated. The Court says:

The question here is not whether what has been done by the American Tobacco Company constituted a restraint of interstate commerce contrary to the Sherman Law and therefore unlawful. The Federal Trade Commission is not clothed with jurisdiction to hear and determine that question in this proceeding, although clothed with a limited jurisdiction as respects alleged violations of Antitrust Acts, Sections 6-10 of the Federal Trade Commission Acts. Its authority to

make the order which it entered herein is restricted to matters of "unfair competition."

Passing the Court's misquotation of the statute by using the term "unfair competition" for "unfair methods of competition," which in itself might lead to erroneous conclusions, we contend that the same acts or practices may constitute a violation of the Sherman Law and an unfair method of competition within the prohibition of the Trade Commission Act. Perhaps every violation of the Sherman Law is not an unfair method of competition. But we had supposed that those restraints of trade which this Court denominates in the *Patten* case (*U. S. v. Patten*, 226 U. S. 525, 541) as "involuntary" restraint of trade, i. e., direct restraints upon the trade of others against their will, were unquestionably unfair methods of competition. The parties are competitors—if this is indispensibly necessary to the use of an unfair method of competition under the Trade Commission Act, which appears to be doubtful—a direct restraint is placed upon the competition of those against whom the combination is directed, and, in the instant case, all price competition in interstate commerce, in a great interstate territory in the commodity affected, is eliminated. What more can be necessary under the decisions of this Court in the *Gratz* and *Beech-Nut* cases, *supra*, to establish an unfair method of competition. The fact that the same acts may restrain trade in violation of the Sherman Act, does not, we submit, take them out of the Trade Commission Act. In the

Gratz case this Court says that the Trade Commission Act includes practices which have a dangerous tendency unduly to hinder competition. In the Beech-Nut case this Court said:

The Sherman Act is not involved here except in so far as it shows a declaration of public policy to be considered in determining what are unfair methods of competition. (257 U. S. 441, 453.)

It would appear therefore that the test of unfairness under the Trade Commission Act is of the same general character as that which must be applied to determine whether there has been a violation of the Sherman Law, though differing in degree under the two Acts. Under the Sherman Law an undue or unreasonable restraint of trade must have been accomplished or must have been threatened. Under the Trade Commission Act the methods are unlawful because of their "dangerous tendency unduly to hinder competition." If, in a proceeding under the Trade Commission Act, it be proven that the effect of the methods employed has been to restrain trade within the meaning of the Sherman Law, it is submitted that the Commission has not put itself out of court by proving too much.

Whether there is sufficient public interest to move the Commission to file a complaint is for the Commission to determine under the Act and its decision in that regard is not reviewable by the Court

In the instant case the Court appears to assume that it can set aside an order of the Commission

on the ground that it was not to the interest of the public that the Commission institute a proceeding. In the Bené case (*supra*, page 9), it squarely held that the order of the Commission was void because it was not to the interest of the public that the proceeding should have been begun. We submit that this construction of the Act is erroneous.

We contend that if the Commission in a given case erroneously determines, after hearing, that methods of competition are unfair within the meaning of the Act, the proper Court may set aside the order based upon such determination. But if the Court finds in a given case that the method of competition prohibited by the Commission's order is unfair *within the meaning of the Act*, it should not set aside an order on the ground that the Commission should not have heard the matter.

The wording of the Act is "if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public." If the words "to the Commission" had been omitted there might have been room for the contention that the Commission's discretion in the matter was not absolute; but the insertion of these words appear beyond question to put absolute discretion in the Commission.

A recent decision in point is that of the Circuit Court of Appeals for the Ninth Circuit in *Hills Brothers v. Federal Trade Commission* (decided January 4, 1926), in which the Court said:

The complaint in this case recites that the commission, in filing the complaint and

making the charges, was acting in the public interest, pursuant to the provision of the Act of Congress, but there was no other or further finding upon that question, and because of the absence of such finding the petitioner contends that the order is erroneous and cannot be sustained. We cannot agree with this contention. An examination of the statute shows very clearly that the question whether a proceeding by the commission in respect thereof would be to the interest of the public, like the question whether the commission has reason to believe that any person, partnership, or corporation has been or is using any unfair method of competition in commerce, is committed to the discretion of the commission, is to be determined by the commission before proceedings are instituted and is not thereafter a subject of controversy either before the commission or before the court, except in so far as the question of public interest is necessarily involved in the merits of the case. And, if the commission finds that the method of competition in question is prohibited by the Act, no other or further finding on the question of public interest is required. (*People v. Ballard*, 134 N. Y. 269.) The petitioner cites *John Bené & Sons v. Federal Trade Commission* (299 Fed. 468), in support of its contention, but the decision in that case was based on the testimony, not upon the absence of a finding that the proceeding was to the interest of the public. True, the court called attention to the fact that

there was no finding to the effect that the proceeding was to the interest of the public, but we do not understand that the court intended to hold that such a finding was necessary. A finding that the method of competition employed was prohibited by the Act, covers and includes the question of public interest and no specific finding on that question is requisite or necessary.

It is interesting to note also that decisions of the highest court of New York construing a statute of that State, almost identical in verbiage to the Trade Commission Act, fully support the Commission's contentions here, and in reason and logic are sound. The decisions referred to construe a provision of Sec. 1808 of the Code of Civil Procedure of New York (now Section 304 of the General Corporation Law) which provides:

Where the Attorney General has good reason to believe that an action can be maintained in behalf of the people of the state
 * * * he must bring an action accordingly or apply to a competent court for leave to bring an action as the case requires; if, in his opinion, the public interests require that an action should be brought.

In *People v. Lowe* (117 N. Y. 174) the Court of Appeals of New York said, respecting the power of the Attorney General under this provision:

He is to determine in the first instance whether the public interests require an action to be brought and he may act upon his determination, subject to no control.

Again in *People v. Ballard* (134 N. Y. 269) the same court said, respecting this provision:

We think that the question as to what the public interests require is committed to the absolute discretion of the Attorney General and that it can not be made the subject of inquiry by the courts.

So to construe the Trade Commission Act is merely to authorize the Commission to determine whether it will proceed; and to remove the possibility that if it should determine not to proceed it may be compelled by mandamus to do so.

The court probably have reached the result which it did in the *Bene* case by resting its opinion upon a different ground. It would have been competent for the Court in that case to have held that the practice was of such a character that it was inconceivable that Congress intended to reach it in a public preventive statute. In other words, that it was not an unfair method of competition within the meaning of the Act. Certainly the method there attacked—disparagement of a competitor's goods—spent its force upon a single competitor, affected the purchasing public remotely and perhaps was, in its nature, more nearly a private than a public wrong. If the Court had rested its decision upon this ground, no complaint could have been made. But when it set aside the Commission's order on the ground, not that the method was not unfair but that the Commission ought not to have instituted the proceeding, it invaded the province of a coordinate branch of the Government.

If the Trade Commission Act be construed as vesting absolute discretion in the Commission to determine whether it shall proceed in a given case, it is constitutional.

It was constitutional for Congress to repose in the Commission uncontrolled power to make the administrative finding of fact which would call the law into action. This Court has repeatedly held that it is competent for Congress to fix the law, to provide that it shall be suspended or called into operation upon the existence of a certain fact or facts, and to provide that the Executive or other administrative officer or body shall conclusively determine the existence of the fact or facts. Perhaps the most striking instance of this is found in *Field v. Clark* (143 U. S. 649), where it was held that it was constitutional for Congress to provide that the President might suspend by proclamation the free introduction into this country of sugar, molasses, and other named products when he is satisfied that any country producing such articles imposes duties or other exactions upon the agricultural or other products of the United States, *which he may deem to be reciprocally unequal or unreasonable*. Decisions in many cases put the point beyond controversy. (*Buttfield v. Stranahan*, 192 U. S. 470, 496; *Union Bridge Co. v. U. S.*, 204 U. S. 364, 383; *Houston v. St. Louis Packing Co.*, 249 U. S. 479, 484; *Mitchell Coal & Coke Co. v. Penn. Ry. Co.*, 230 U. S. 247,

257; *Mfgs. Ry. Co. v. U. S.*, 246 U. S. 457, 482.)

In the case last cited the Supreme Court says:

It may be conceded that the evidence would have warranted a different finding; indeed the first report of the Commission was to the contrary; but to annul the Commission's order on this ground would be to substitute the judgment of a court for the judgment of the Commission *upon a matter purely administrative*, and this can not be done.

If the question of the presence of public interest is for the Court, the test suggested by the Court below is erroneous.

If it was competent under the statute for the Court to set aside the Commission's order because it was not to the public interest that a proceeding should have been begun, the test of public interest suggested by the Court in this case is unsound. The suggestion that it is not to the interest of the public to prevent agreements between wholesalers fixing prices at which they will sell commodities is startling. On the *Miles Medical Case*, *supra*, the Court said:

But agreements or combinations between dealers, having for their sole purpose the destructions of competition and the fixing of prices, are injurious to the public interest and void.

The Court appears to be of opinion that if retailers were included in the combination it would be to the interest of the public to suppress its

activities. Presumably the basis of the Court's suggestion with respect to want of public interest is the absence of proof that the increased prices of the wholesalers are reflected in the retailers' prices and therefore passed on to the consuming public. But no such proof of direct pecuniary injury to the public should, it is submitted, be necessary to show public interest. If preventing direct restraint of trade is not to the public interest, how shall we explain the legislative policy represented in the Sherman Law and its amendments, the Clayton Act, the Trade Commission Act, and in anti-trust laws in nearly all of the States of the Union. We had supposed that when the Trade Commission issued a complaint charging that a combination of manufacturers or dealers had been fixing prices, public interest in the proceeding would have been beyond question. Proof that the public paid higher prices as the result of such combinations was, we supposed, wholly unnecessary. The rule is so well established under the Sherman Law that citations of authority are not needed. Nothing in the decisions of this Court under the Trade Commission Act appears to change this rule.

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JANUARY, 1926.



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In the Supreme Court of the United States

OCTOBER TERM, 1926

No. 279

FEDERAL TRADE COMMISSION

v.

AMERICAN TOBACCO COMPANY

BRIEF FOR PETITIONER

OPINION BELOW

The opinion of the court below (Rec. 781) is reported in 9 Fed. (2d) 570.

JURISDICTION

The judgment to be reviewed was entered October 27, 1925. (Rec. 805.) That was on a petition to the Circuit Court of Appeals for the Second Circuit to review and set aside an order of the Federal Trade Commission entered under authority of Section 5 of "An Act To create a Federal Trade Commission, to define its powers and duties, and for other purposes." (Act of September 26, 1914, C. 311, 38 Stat. 717.) The jurisdiction of the court below was invoked under authority of Section 5 of that Act.

The jurisdiction of this court is invoked under Section 5 (paragraphs 4 and 5) of the Federal Trade Commission Act (38 Stat. 717), and under Section 240 of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

The questions presented are as follows:

1. Is the Commission's finding that the American Tobacco Company agreed with the members of the Philadelphia Association to decline to sell its products to any jobber who did not maintain the prices agreed upon by the jobbers supported by evidence?
2. Was it lawful for the American Tobacco Company, with full knowledge of the illegal agreement of the jobbers to fix prices at which they would sell and to prevent jobbers who sold at less than these prices from getting the goods, actively to aid and abet the jobbers in making effective their illegal agreement?
3. Is it an unfair method of competition for the members of a jobbers' association to agree to fix prices at which they will sell and to prevent both members of the association and nonmembers who do not observe the agreed prices from procuring the goods?
4. Is it an unfair method of competition for a manufacturer to join with a jobbers' association in compelling its members to observe prices illegally agreed upon and in preventing jobbers who

do not observe the prices from procuring the manufacturer's goods?

5. Is it an unfair method of competition for jobbers to sell goods at prices satisfactory to themselves and which in the past have sustained their business, though such prices may be lower than those agreed upon by the members of an association of competing jobbers?

6. May a combination in restraint of interstate commerce in violation of the Sherman Act amount also to an unfair method of competition within the meaning of the Federal Trade Commission Act?

7. Must the Commission in each case allege in its complaint that a proceeding is to the interest of the public, introduce evidence to prove the allegation, and make a finding of fact that the proceeding is to the interest of the public as a condition precedent to entering a valid order to cease and desist under the statute?

8. Is it to the interest of the public to prevent jobbers from agreeing upon prices at which they will sell and from agreeing to prevent those who will not observe their prices from getting the goods, even though no evidence be adduced that the increased prices of the jobbers are passed on to the consumer through increased prices of the retailer?

STATEMENT OF THE CASE

The Federal Trade Commission, hereinafter referred to as the Commission, issued a complaint (Rec. p. 11) on May 29, 1922, against certain to-

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bacco wholesalers located in Philadelphia, Pennsylvania, and Camden, New Jersey, and two manufacturers of such commodities, namely, The American Tobacco Company and P. Lorillard Company. The complaint charged that the wholesalers and manufacturers were then and had been using unfair methods of competition in interstate commerce in violation of Section 5 of the Federal Trade Commission Act. Briefly stated, the complaint alleged that the wholesalers, who were organized into an unincorporated association called the "Wholesale Tobacco and Cigar Dealers Association of Philadelphia, Pennsylvania," were engaged in a price-fixing combination and conspiracy; that the manufacturers mentioned cooperated and conspired with the members of the association and participated in the maintenance of the price-fixing system; that as a part of the price-fixing system adopted and maintained by the jobbers they sought and secured the cooperation of the manufacturers in persuading and intimidating wholesalers in their territory and outside of their territory to maintain the prices fixed by the association, and that the manufacturers by circular letters and otherwise notified the trade in that territory that they would refuse to continue furnishing supplies of their products to such wholesalers as might not observe the prices fixed by the wholesalers; that the wholesalers on reporting to the manufacturers names of dealers sus-

pected of refusing to observe the association's prices, and on requesting the cooperation of the manufacturers, secured that cooperation, by which the manufacturers upon ascertaining that the reports were well founded refused to continue to sell to such offending wholesalers.

The Commission, after hearing argument on the testimony taken before its trial examiner, made its findings (Rec. p. 715) and entered an order on February 16, 1924, against the wholesalers and against The American Tobacco Company, requiring them and each of them to cease and desist from the use of the method of competition alleged in the complaint and set out in the findings (Rec. p. 723). On the same day the Commission dismissed the complaint as to P. Lorillard Company.

The order (Rec. p. 723) required the wholesalers to "cease and desist from fixing, enforcing and maintaining, and from enforcing and maintaining, by combination, agreement, or understanding among themselves or with or among any of them, or with any other wholesaler of cigarettes or other tobacco products, resale prices for cigarettes or other tobacco products dealt in by such respondents, or any of them, or by any other wholesaler of cigarettes or other tobacco products."

The order required The American Tobacco Company to "cease and desist from assisting and from agreeing to assist any of its dealer-customers in maintaining and enforcing in the resale of cigarettes and tobacco products manufactured by the

said The American Tobacco Company, resale prices for such cigarettes and other tobacco products, fixed by any such dealer-customer by agreement, understanding or combination with any other dealer-customer of said The American Tobacco Company."

The order (Rec. p. 723) required The American Tobacco Company and the other parties named therein to file with the Commission within sixty days after service of the order, a report in writing stating the manner and form in which the order had been conformed to. The wholesalers' reports filed in compliance therewith (Rec. pp. 727-738) stated that none of the matters, things, practices, and activities alleged in the complaint and found as facts in the opinion of the Commission of February 16, 1924, had been practiced since February, 1922. The American Tobacco Company applied to the Circuit Court of Appeals for the Second Circuit to review the Commission's proceeding, and to set aside the order to cease and desist. In due time, the case came on for argument and the court set the commission's order aside. (Rec. p. 805.)

At the time the Commission made its order, namely, February 16, 1924 (Rec. p. 723), there were pending before it for consideration other cases against The American Tobacco Company and P. Lorillard Company. These cases were of the same general nature as this case, except that the wholesalers involved were located in cities other than Philadelphia and Camden. One was against

The American Tobacco Company and wholesalers located in Cincinnati, Ohio, and neighboring places in Kentucky. Another was against P. Lorillard Company and the same wholesalers in Cincinnati, Ohio, and neighboring places in Kentucky. The Commission dismissed its complaint against The American Tobacco Company and those wholesalers, but made a finding as to the facts and issued an order to cease and desist against P. Lorillard Company and those wholesalers, February 29, 1924. (7 F. T. C. Decisions 351.)

No petition for review has ever been filed by P. Lorillard Company or any of the wholesalers proceeded against in that case, to set aside the order to cease and desist.

The scope of the assigned errors urged herein requires a rather thorough discussion of the record and of the opinion of the Court below. It may, therefore, be sufficient for the purpose of summarizing the record into a statement of the case to state that the proof is that the wholesalers organized themselves into an association styled as above and that by means of that organization fixed prices for selling tobaccos and cigarettes in their territory, which included Philadelphia and Camden, and the territory adjacent to both cities. This was done by fixing a discount of 8% from the list price at an association meeting on September 16, 1920. (Rec. p. 660.) On June 20, 1921, the wholesalers raised their prices by reducing the discount from

8% to 7%. (Commission Exhibits 4 and 5, Rec. pp. 669-670.) By way of explanation of this method of fixing prices it should be stated that the tobacco manufacturing companies issue list prices on their goods and make their own prices to customers based on a discount from these list prices. The jobbers use the same lists in reselling, and their agreement therefore to sell tobacco and cigarettes at 8% off the list fixed a uniform selling price.

Having agreed upon the prices to be charged by the members, the Association cast about for means of compelling members to observe the prices, of inducing and compelling those outside of the Association to become members and thus becoming parties to the agreement, and of inducing and compelling wholesalers located outside of Philadelphia and Camden, who might sell in the territory covered by the members of the Association to maintain the Association's prices. It was apparent that if the great tobacco manufacturing companies would join with the members of the Association, all of the ends of the Association would be accomplished. For if manufacturers would refuse to sell to price cutters or those who would not join the Association, price cutters and recalcitrants would either be compelled to maintain the Association's prices or to go out of business. Accordingly, negotiations were entered into by the Association with the American Tobacco Company for the pur-

pose of securing the assistance of that company in the Association's activities regarding price fixing. The Association sought and secured the cooperation of the American Tobacco Company in such persuasion and intimidation. (Rec. pp. 430-431.) Names of offending dealers were furnished to the American Tobacco Company requesting its assistance in the enforcement of its system of price fixing and The American Tobacco Company, upon receiving such information, proceeded to investigate and upon finding that an offending dealer was cutting prices refused to furnish the dealer with further supplies. (Rec. p. 383; Commission's Exhibit 16, Rec. p. 232.)

During the period of fixed prices, as set out hereinbefore, The American Tobacco Company issued circular letters to its wholesalers, which in effect signified that that company would cooperate in the maintenance of prices fixed by its jobbers in any given territory. This letter was also a veiled threat that the company would refuse to continue selling to any of its customers who would sell at prices less than those fixed by a majority of its customers in any given territory. (Rec. p. 672.) Of course, it applied to the Philadelphia and Camden territory.

Consequently in the period in which the Association adopted and maintained uniform resale prices for the products of The American Tobacco Company, it was the policy of that company to assist groups of its jobbers who would fix or who had fixed

by cooperation among themselves, uniform resale prices on its products, by refusing shipments of its goods to such jobbers as had resold or who would resell at prices lower than those fixed by such jobbers by agreement or cooperation among one another.

The American Tobacco Company knew of the Association's price agreements and expressly agreed with the Association to help its members to maintain those price agreements. (Rec. pp. 430-431.) The American Tobacco Company cut off from its direct list a price-cutting competitor of the members of the Association. This jobber, continuing to resell at prices in effect by him previous to the organization of the Association and refusing to comply with the direction of The American Tobacco Company that he join (Rec. p. 315), was removed from the list of distributors of the tobacco company for the purpose of assisting the Association to maintain its price agreements (Rec. p. 383). The American Tobacco Company removed from its list of customers another of its price-cutting jobbers for the purpose of assisting the Association in maintaining its fixed prices. (Commission's Exhibit No. 16, Rec. p. 232.) This jobber had been expelled from the Association for price cutting. (Rec. pp. 237-239.)

In addition to the assistance furnished by the tobacco company to the Association in the latter's price-fixing scheme, it also cooperated by way of withholding shipments of goods to two members of

the Association who were suspected of price cutting and who had been reported by officers of the Association to The American Tobacco Company as being suspected of having cut the Association's prices. (Rec. pp. 386-387.) The Circuit Court of Appeals in its opinion indicates that the finding of the Commission regarding the policy of The American Tobacco Company in supporting price-fixing organizations of its jobbers in various localities and regarding the application of that policy to its Philadelphia and Camden jobbers is justified from the record, for the Court says:

The policy of the wholesalers and jobbers was to fix a uniform price at which they would sell to the retailers, and they agreed to allow a certain trade discount of 7 or 8 per cent, as the case might be, from the manufacturers' list prices. And what the American Tobacco Company did was to refuse to sell its products to wholesalers or jobbers who, having bought its products at a price fixed by it, thereafter sold them to the retailers at a greater trade discount than the Wholesalers' Association had agreed upon. In other words, its policy was to *uphold and support the prices of its products as fixed in a particular locality by the wholesalers or jobbers therein.* (Italics ours.) (Rec. p. 797.)

The effect of the combination of the jobbers and of the tobacco company was to suppress and eliminate price competition both among members of the

association and nonmembers or, stated in another way, the effect of the combination was that it became an impossibility for a retailer located in Philadelphia or Camden territory to purchase cigarettes and tobaccos from any jobber, wherever located, at any price lower than that put into effect by the Association. (Rec. pp. 162, 156, 157, 198.)

There are, therefore, from the complaint and the facts, three main issues, as follows:

(1) Whether The American Tobacco Company expressly agreed with the Association to assist in the maintenance of its prices, or whether an agreement to that effect can be implied from the facts established.

(2) Whether, even though The American Tobacco Company did not agree to assist the association in maintaining the Association's prices, it cooperated with the Association for that purpose.

(3) Whether under the proof of an express agreement, an implied agreement, or cooperation between the Association and the Tobacco Company, a violation of Section 5 of the Federal Trade Commission Act is established.

The court below was of the opinion that the record did not establish an express agreement between the American Tobacco Company and the Association. (Rec. p. 795.) We urge, however, that the record does establish an express agreement, but that

if it does not, it does establish facts from which an agreement can properly be inferred. And, we urge that the record does establish beyond any question (and the court concedes this to be so, Rec. p. 797) that The American Tobacco Company actively co-operated with the Association for the purpose of assisting the Association in maintaining the prices which it fixed. Price maintenance, if accomplished by agreement, express or implied, or by cooperation, we contend to be an unfair method of competition.

The reasons for the contention regarding the law properly to be applied to the facts established by the record, as well as to the facts conceded by the court below to be established, are hereinafter set forth in the argument.

**SPECIFICATION OF THE ASSIGNED ERRORS INTENDED
TO BE URGED**

In its petition for the writ of certiorari in this case, the Commission set out on page five thereof the questions presented by reason of the opinion of the court below. The assigned errors to be urged are that the court below erred—

(1) In holding that the Commission's finding that the American Tobacco Company agreed with the members of the Philadelphia Association to decline to sell its products to any jobber who did not maintain the prices agreed upon by the jobbers was not supported by the evidence.

(2) In holding that it was lawful for The American Tobacco Company, with full knowledge of the illegal agreement of the jobbers to fix prices at which they would sell and to prevent jobbers who sold at less than these prices from getting the goods, to aid and abet the jobbers in making effective their illegal agreements.

(3) In holding that it is not an unfair method of competition for the members of a jobbers' association to agree to fix prices at which they will sell and to prevent both members of the association and nonmembers who do not observe the agreed prices from procuring the goods from the manufacturer.

(4) In holding that it is not an unfair method of competition for a manufacturer to join with a jobbers' association in compelling its members to observe prices illegally agreed upon and in preventing jobbers who do not observe the prices from procuring the manufacturer's goods.

(5) In holding that it is an unfair method of competition for jobbers to sell goods at prices satisfactory to themselves and which in the past have sustained their business, though such prices may be lower than those agreed upon by the members of an association of competing jobbers or, conversely, in holding that it is fair competition for jobbers to combine to coerce competitors into charging prices which the jobbers have agreed upon as satisfactory to such jobbers.

(6) In holding that a combination in restraint of interstate commerce in violation of

the Sherman Act may not amount also to an unfair method of competition within the meaning of the Federal Trade Commission Act.

(7) In holding that the Commission in each case must introduce evidence to prove and must make a finding of fact that a proceeding by it under Section 5 of the Federal Trade Commission Act is to the interest of the public, as a condition precedent to a cease and desist order, or stated in another way, that the absence of a finding of fact by the Commission that a proceeding by it has been in the interest of the public invalidates the finding and the order predicated upon the finding.

(8) In holding that it is not to the interest of the public to enjoin jobbers from agreeing upon prices at which they will sell and to enjoin them from agreeing to prevent those who will not observe their prices from getting the goods, though no evidence be adduced that the increased prices of the jobbers are passed on to the consumer through increased prices of the retailer.

These errors specified will be discussed in the argument as these three main points:

(1) That the Commission's findings are supported by the testimony which establishes an express agreement between the Association and the tobacco company, or an implied agreement and cooperation between the tobacco company and the Association.

(2) That the complaint and findings set out an unfair method of competition in violation of Section 5 of the Federal Trade Commission Act.

(3) That it is not necessary for the Commission to find as a fact that a proceeding instituted by it is in the interest of the public.

SUMMARY OF ARGUMENT

The issues of fact arising from the complaint and the answers present a matter of fact-finding for the Commission. There is proof of an express agreement between the Association and the Tobacco Company to assist the Association to enforce its fixed prices. This proof is based on the direct testimony of the president of the Tobacco Company on direct examination by counsel for the Commission. While it is true that on cross-examination by his own counsel he testified that he never consciously invited or cooperated in the making or carrying out of any agreements among jobbers or retailers that would limit their right to sell at prices which they pleased, the Commission based its finding of an agreement upon his direct testimony that he did enter into an agreement with the Association.

If the proof upon which we rely does not justify the finding of an express agreement, the conduct of the parties is sufficient basis for the Commission to infer an agreement.

Even in the absence of a finding of agreement, the order to cease and desist should stand, for the

court below concedes, as we understand its opinion, that for the purpose of assisting the Association in maintaining its price agreements the American Tobacco Company cut off two jobbers from its list of customers and suspended shipments to other jobbers. This is price fixing by cooperation and combination, and an agreement is not necessary to make this kind of a restraint upon interstate commerce unlawful under the Trade Commission Act.

The fact that the complaint charges and the record discloses a violation of the Sherman Act does not take the correction of the practice out of the jurisdiction of the Commission, nor does the fact that the prices fixed are those between wholesaler and retailer and do not extend from the retailer to the consumer make it any less unlawful than if they did extend to the prices charged by retailers to consumers, for the principle is the same.

The Commission's findings are not void from the fact that they do not state that the proceeding has been justified as being in the public interest; for a finding, such as the Commission made in this case, that the method of competition employed was prohibited by the act covers and includes the question of public interest, and therefore no specific finding on that question is necessary.

The opinion below is contrary to the doctrine laid down by this court in *Federal Trade Commission v. Beech-Nut Packing Company*, 257 U. S. 452. The opinion below has been criticized by the

Circuit Court of Appeals for the Sixth Circuit (*Toledo Pipe Threading Machine Company v. Federal Trade Commission*, 11 Fed. (2d) 337). The opinion below is in irreconcilable conflict with principles laid down in two other cases in two different Circuit Courts of Appeals (*Hills Brothers v. Federal Trade Commission*, 9 Fed. (2d) 481, and *Scalpar Company v. Federal Trade Commission*, 5 Fed. (2d) 574). Furthermore, in two cases in this Court, decided since the opinion below, doctrines are laid down which are at complete variance from the reasoning in the opinion below. These cases are *Federal Trade Commission v. Pacific States Paper Trade Association*, decided January 3, 1927, and *United States v. Trenton Pottery Company*, decided February 21, 1927.

ARGUMENT

I

The Commission's findings are supported by testimony which establishes an express agreement between the Association and the Tobacco Company, or an implied agreement and cooperation between the Tobacco Company and the Association

While the court below does not suggest that the findings as to the wholesalers are not supported, the effect of the agreement found by the Commission to have existed between the Association and the tobacco company, as well as the effect of the cooperation conceded by the court to have existed between the two may perhaps be better appreciated if we discuss the record in the following order:

(A) The Association, its agreements and its activities.

(B) The effect of the price agreements on competition in Philadelphia and vicinity.

(C) The connection of the American Tobacco Company with the price-fixing agreements of the Association, its general selling policy during the period involved and the application of that policy to the Association's activities.

(1) General policy.

(2) Proof of express agreement.

(D) The suspension of Charles Seider from the direct list of the American Tobacco Company.

(E) The suspension of Murphy Brothers from the direct list of the American Tobacco Company.

(F) The withholding of shipments to Fermani and Blumenthal.

(G) The evidence justifies finding of an implied agreement between the American Tobacco Company and the Association.

(H) The American Tobacco Company a conspirator.

(I) The dismissal of the complaint as to P. Lorillard Company, Incorporated, is not a reason for dismissing the complaint against the American Tobacco Company.

(A) The Association, its agreements and its activities

The Wholesale Tobacco & Cigar Dealers' Association of Philadelphia was formed on August 5, 1920, following an organization meeting held at the Hotel Adelphia in Philadelphia on July 22, 1920.

Among the objects of the Association, as shown by the constitution, is the following:

To correct any abuses as may exist in the conduct of the trade by its various members. (Rec. p. 666.)

The officers chosen at the first meeting were Nelson Eberbach, president; Harvey D. Narrigan, vice president; James Murphy, vice president; Herman J. Krull, treasurer; Paul L. Brogan, secretary.

The officers chosen at the organization meeting and the members of the committees named at the meeting on September 2, 1920, remained and continued such officers and committeemen until at least January 6, 1922 (Exhibits 1 and 2, Rec. pp. 658, 666), except that William Fink on June 6, 1921, was elected second vice president in place of James Murphy, of Murphy Brothers.

The membership of the Association comprised all of the wholesale tobacco and cigarette dealers in Philadelphia and Camden, excepting two, namely, Charles Seider and Fringes Sons. (Rec. p. 116.) The latter, Fringes Sons, seem to have been, according to the record, engaged chiefly in the manufacture and sale of cigars rather than of cigarettes and tobaccos.

On September 16, 1920, at a special meeting of the Association held at the Gladstone Apartments, the following report of the executive committee was adopted:

Your committee reports that at a meeting of the board of directors held September 2d,

it was unanimously resolved that the cash discounts on tobaccos and cigarettes be not more than 8%. (Commission Exhibit No. 1, Rec. p. 660.)

On December 6, 1920, at a regular monthly meeting of the Association the executive committee made the following report:

Your committee recommends that when gratis or other deals on cigarettes or tobacco are placed by the various companies, having a time limit, that immediately after the expiration of such time limit members will suspend the operation of the deal. Your committee also recommends that district agents of the various companies be permitted to pick up from the members their own products at list less 5%. The committee also made recommendation relative to prices on cigarettes and tobacco. (Commission's Exhibit No. 1, Rec. p. 661.)

The minutes show that the recommendations of the executive committee were adopted.

It has been the practice for a great number of years for tobacco manufacturers to sell to their direct customers, all of whom are wholesalers, on the basis of discounts from list prices fixed by the manufacturers. In 1921 and for many years prior thereto tobacco manufacturers, including The American Tobacco Company, allowed to their customers a discount of 10 per cent from the manufacturer's list prices, with an additional discount of 2 per cent for cash within 10 days. The jobber has always used

the manufacturer's list prices as the price basis of his resales to the subjobber and to the retailer; that is to say, while the jobber would buy at 10% discount from list price with an additional discount of 2 per cent for cash within 10 days, the jobber, in turn, resold to the retailer and to the subjobber on the basis of discounts from such list prices. The subjobber, in turn, resold to the retail trade also on the basis of discounts from the list price. The list price, as such, goes no further than to the retailer, because it is not the price intended to be charged by the retailer to the consumer.

The agreement as to discounts to be allowed the representatives of the tobacco manufacturing companies was called to the attention of those companies by the president of the Association. A letter written by Eberbach to P. F. O'Boyle (field sales manager) of The American Tobacco Company (Commission's Exhibit No. 7, Rec. pp. 670, 671) is as follows:

Please be advised that the best price we make to missionary men on your line and all other lines is a discount of 5%. This is the lowest price that our Association permits any jobber to make to factory representatives, and if you hear of any competing factory representative purchasing goods for less than this price, will you please advise the writer?

At a meeting held on February 7, 1921, Asbury Davis, of Baltimore, a member of the firm of F. A.

Davis & Sons, made a "very interesting and constructive address," for which he was given a vote of thanks. It is clear that the address must have had some relation to an arrangement made between the Association and the Baltimore tobacco jobbers, in view of the fact that, according to a letter written by A. B. Cunningham & Company, of which the president of the Association was a partner (Commission's Exhibit No. 6; Rec. p. 670), there was an agreement between Baltimore jobbers and the Philadelphia Association on discounts and prices for Delaware by means of which competition as to prices or discounts between Baltimore jobbers and Philadelphia jobbers was eliminated.

The working cooperation between Baltimore jobbers and the Association is shown by letters in evidence, particularly Exhibits 6, 8, and 9. (Rec., pp. 670, 671.) These letters show also that the president of the Association notified S. T. Banham & Son that if they did not discontinue cutting prices in Delaware the matter would be taken up with the American Tobacco Company to compel the cessation of price cutting against Baltimore jobbers in Delaware, as to which territory there was a price-fixing agreement between the members of the Association and the Baltimore jobbers.

The meeting of June 6, 1921, was preceded by a banquet, following which there was an election of officers. A resolution was adopted, which does not appear on the minutes, by which the rate of dis-

count was lowered from 8 per cent to 7 per cent, which, in effect, raised prices. Notices were sent to all of the members of the Association stating that effective June 20, 1921, the maximum trade discount would be 7 per cent. (Commission's Exhibits 4 and 5, Rec. pp. 669, 670.) Other notices of action by the Association were sent to its members. (Rec., p. 287; Exhibit 12, p. 674.)

At a meeting held on May 2, 1921, the executive committee was authorized to employ a special investigator at a salary not to exceed \$50 a week. (Commissioner's Exhibit 1; Rec. p. 663.) An investigator named John W. Kane was appointed at a salary of \$40 per week for the purpose of checking up the discounts allowed by members of the Association to see to it that the agreed discount of 8 per cent, and later of 7 per cent, was lived up to. (Rec., pp. 55, 65.) His duties were explained to him, and he was informed of the fact that a discount from list had been agreed upon by the Association. It was the duty of Kane to report to Eberbach, Krull, or Brogan the names of jobbers who might be found to be cutting prices. (Rec., p. 68.)

Of course the purpose for which the investigator was employed could not be accomplished if the members of the Association knew his identity. Consequently his identity was not divulged by those who employed him. The witness Narrigan, although a vice president of the Association, did not know the identity or name of the investigator employed by

the Association until he saw him on the witness stand in this case and heard his testimony. (Rec., p. 279.)

Among the firms who were reported by Kane to the executive committee for price cutting were Murphy Brothers, M. Blumenthal, V. Fermani, and Charles Seider, all of whom were purchasers from The American Tobacco Company. (Rec., pp. 80-82.) When these reports by Kane were made to the executive committee, they generally reported in turn the names of the price-cutting jobbers to the representatives of The American Tobacco Company, particularly O'Boyle and Spitzmiller. (Rec., pp. 86-87.)

The Association, through its president, endeavored to induce price-cutting jobbers to abide by the Association's prices. Murphy Brothers were visited at Camden, New Jersey by Eberbach and Krull, who remonstrated with them for cutting the Association's agreed discount. (Rec., pp. 216, 217.) At a dinner of the Association other members complained to Murphy Brothers about their price-cutting activities and endeavored to induce them to live up to the discounts fixed by the Association. (Rec., p. 218.)

Letters of The American Tobacco Company (Commission's Exhibits 17, 18, 19, and 20; Rec., pp. 221-223) show that the complaints made by the Association to The American Tobacco Company regarding the activities of Murphy Brothers were

welcome. On August 27, 1921 (Commission's Exhibit 17; Rec., p. 221), the sales manager of The American Tobacco Company wrote to the field sales manager informing him that Mr. Hill, vice president of The American Tobacco Company was very anxious to ascertain whether the information in his possession that Murphy Brothers were allowing 10 per cent off American Tobacco Company's list price to three Philadelphia firms was correct, and that any information which Mr. O'Boyle, field sales manager, would impart to Mr. Hill on that subject would be highly appreciated. This information was secured by O'Boyle for Mr. Hill. (Exhibit No. 19; Rec. p. 222.)

The American Tobacco Company in its cooperation (see pp. 55-58, *infra*) with the Association, discontinued the account of Murphy Brothers from September 2, 1921 (Commission's Exhibit 20; Rec., p. 223), until October 4, 1921 (Commission's Exhibit 21; Rec., p. 223).

Charles Seider (see pp. 52-55, *infra*) was cut off, in the words of O'Boyle (sometimes described in the record as field sales manager, other times as district sales manager, and at other times as division manager), for "selling merchants in Philadelphia at less than the price in effect here by this group of jobbers." (Rec., p. 383.) Shipments to V. Fermani and Blumenthal, other price-cutting jobbers, were also held up by the American Tobacco Company (Rec., pp. 386, 387), because

of the reports made to The American Tobacco Company by officers of the Association upon information furnished to them by the investigator, Kane.

The activities of the Association conclusively appear from the record to have been devoted to the regulation of prices in cooperation with the American Tobacco Company.

In our discussion regarding the cooperation of the American Tobacco Company with the Association's activities, we shall show how Eberbach, president, and Krull, treasurer of the Association went to New York, where they secured from Percival S. Hill, president of The American Tobacco Company, his promise of cooperation with the "satisfactory" condition brought about by the Association. (See *infra*, pp. 46-50.)

(B) The effect of the price agreements on competition in Philadelphia and vicinity

The record shows that prior to the price-fixing agreements of the jobbers they had been competing with one another in discounts and prices. (Rec., pp. 162, 127, 128; Com. Ex. 13; Rec. pp. 674, 675, 198.) When the price agreements went into effect price competition among the jobbers was eliminated. (Rec. pp. 162, 156, 157, 158, 127, 128, 129, 130.) This elimination of price competition was complete excepting from two jobbers, viz, Murphy Brothers, who were expelled from the Association, and Charles Seider, who had refused to join the Association.

Seider continued selling at the discounts which he had been allowing years prior to the organization of the Association. Murphy Brothers, however, while selling below the Association's prices, attempted to conceal the amount of discounts they were allowing by billing the goods at the Association's discounts but secretly allowing some concerns an additional discount. (Rec. p. 258.)

Up to the time the price-fixing arrangement was made by the jobbers there had existed for a great number of years in Philadelphia a class of tobacco merchants known as subjobbers. These subjobbers are called such because, while they sell tobaccos and cigarettes at wholesale, they do not buy directly from the tobacco-manufacturing companies, but buy from wholesalers who do buy directly from the manufacturers. These subjobbers resell to retailers and in many instances conduct a retail business as well as a wholesale business. From the nature and extent of his business, the subjobber naturally buys and handles larger quantities of cigarettes and tobaccos than does the ordinary retailer and for many years, due to that fact, he had been allowed in Philadelphia a discount greater than the discount being allowed by wholesalers to retailers. When the agreed discounts went into effect, they applied to subjobbers as well as to retailers, the practical operation and effect of which was to allow the subjobber no better price than was allowed to the retailer, from sales to whom the subjobber looked for his profit. Conse-

quently, the subjobber was eliminated. There was a great number of these subjobbers in Philadelphia. When they were eliminated from selling to the retailers, they organized an association of their own in order, if possible, to relieve the situation which the price-fixing agreement had placed them in.

On October 29, 1920 (Com. Ex. 13; Rec. pp. 674, 675) they addressed a letter to the president of the American Tobacco Company outlining the Philadelphia situation and calling the attention of the American Tobacco Company to the situation. They asked the president of the American Tobacco Company for help. The letter was not answered. (Rec. p. 190.) Thereupon the subjobbers, through the president of the Association which they had formed, took up the matter with the president of the Jobbers Association. They were not successful in getting from the Jobbers Association any better discount than the discount allowed by the Jobbers Association to retailers. (Rec. p. 190.) On April 2, 1921, the subjobbers association wrote the Jobbers Association asking for a correction of the existing conditions so that the subjobbers might continue in business. (Com. Ex. 14; Rec. pp. 675, 676.) This letter was read at a meeting of the Association held April 4, 1921, and it was referred to the executive committee of the Association. (Com. Ex. 1; Rec. p. 663.) The executive committee ignored the letter. (Rec. p. 95.)

It was shortly after this meeting of the Association that it raised its prices to the retail trade by

changing the discount from 8% to 7%. As a consequence of the combined action of the members of the Jobbers Association, acting through it, these sub-jobbers were wiped out of the jobbing business, and as a further consequence retailers, excepting in a very few instances, were deprived of the right of price competition from the jobbers. This result, it follows, was reflected in the prices allowed by retailers to consumers.

These price agreements totally destroyed competition as to price in the wholesaling of The American Tobacco Company's products.

The retailer of cigarettes and the like, being deprived of his right of price competition among the wholesalers, was less able to compete in price with other retailers, and all this had the effect of bringing about uniformity of price to that part of the general public represented by the consumers, who were deprived of the benefit of price competition among retailers.

(C) The connection of The American Tobacco Company with the price-fixing agreements of the Association, its general selling policy during the period involved, and the application of that policy to the Association's activities

1. GENERAL POLICY

The price-fixing agreements of the Association could not have been maintained without the assistance of The American Tobacco Company, which did assist in their maintenance. There is a strong demand for the brands of cigarettes and tobaccos manufactured by The American Tobacco Company,

particularly in the territory covered by the members of the Association. (Rec. pp. 233-234.) The means by which The American Tobacco Company gave its assistance to price-fixing agreements such as those entered into by the jobbers in this case, was to threaten to remove and to remove from its list of direct buyers anyone who violated his agreement entered into with other wholesale dealers of The American Tobacco Company in his territory. The tobacco jobber, of course, appreciates this powerful weapon in the hands of a tobacco manufacturing company. Usually he will conduct his business in such a way as not to be cut off the direct list of the manufacturer.

There is clear proof that The American Tobacco Company continuously cooperated with its jobbers to maintain resale prices of its products fixed by groups of its jobbers. Its policy was to encourage price-fixing agreements and when price-fixing agreements had been entered into, to offer assistance in the maintenance of them by threatening such price fixers that if they did not live up to the terms of their agreement they would be removed from the direct list of the company. This method of doing business characterized the policy of the company, particularly during the year 1920, although in that period that policy was not avowed so openly as in June, 1921, when its circular No. 2783 (Com. Ex. 10, Rec. p. 672) was issued to the trade. This circular letter is a direct threat to

remove price-cutting jobbers from the list of direct buyers. The circular reads as follows:

CIRCULAR NO. 2783

THE AMERICAN TOBACCO COMPANY,
INCORPORATED,
111 Fifth Avenue,
New York, June 29, 1921.

To our jobbing customers:

It is of the highest interest to this Company to maintain permanent means of distributing its brands of tobaccos and cigarettes by efficient and businesslike methods.

We can only expect to obtain and hold customers when it is possible for jobbers to sell our products profitably.

It is obvious that a jobber of our products who sells at prices which would not permit of the tobacco business itself being profitable taken by itself is a jobber who in the long run will be a detriment and not a benefit to our business as our customer.

Any jobber who sells our products without profit or with such a small profit that it will not benefit him to continue permanently in the tobacco jobbing business on such a margin of profit is not a distributor who can afford us a safe and permanent avenue of distribution, and, if by his persistent price cutting he discourages and destroys the interest in our brands with competing jobbers we may eventually be left without adequate means of thorough distribution in his locality.

For this reason we are convinced that for the future of our business we are bound to

prevent as far as we reasonably and lawfully may such demoralization in the trade so far as our products are concerned. This does not mean price maintenance, but it does mean that where a jobber is not interested in making a fair and reasonable profit on our brands and elects to sell our products, for motives of his own, at less than a living profit, we are forced to the conclusion that he is not sufficiently interested in our goods to make a desirable permanent customer and we shall feel at liberty to remove him from our list of direct customers.

We trust that this policy will have the approval of all customers who are concerned in making a livelihood out of the tobacco business.

Very respectfully,

THE AMERICAN TOBACCO COMPANY, INC.,
 GEORGE W. HILL, *Vice President.*

This is the circular to which subparagraph E of paragraph 2 (Rec., p. 721) of the Commission's findings refers.

Assuming for the sake of argument that the circular on its face is within the law and that a manufacturer acting independently and alone may threaten to cut off and may cut off from its direct list such of its distributors as it pleases, the difficulty with this circular lay in the circumstances and purposes which prompted its issuance, in the construction placed upon the circular by the company and the trade, in the thoroughly planned method of carrying out the threats contained in

the circular, in determining what price cutting was not a benefit to the business of The American Tobacco Company, in determining what price cutting or what discounts discouraged the interests of competing jobbers in The American Tobacco Company's brands, and in the combinations which the circular invited and brought about between the Company and groups of its jobbers, because the terms of the circular could not have been carried out by The American Tobacco Company independently from groups of its jobbers.

From the record, we submit that, after all, the circular (conceding, for the sake of argument, that it may have been proper and legal on its face) was merely a part of a general plan or scheme openly to encourage jobbers into making price-fixing agreements and to offer assistance in the maintenance of such price-fixing agreements.

Various form letters gotten up by The American Tobacco Company for the purpose of answering communications from its jobbers with respect to the circular above quoted, and form letters used in connection with the policy announced by the circular confirm the argument we make. When a jobber would write to The American Tobacco Company commending it on the issuance of the circular, the company would send that jobber a form letter signed by Mr. Hill, vice president (Com. Ex. 33; Rec. pp. 682-683), which contained the following language:

It is not our purpose here to establish the price at which our merchandise is sold; that is a matter which rests entirely in the hands of our customers in any given community.

We have no hesitation, however, in assuring you that where a customary price prevails in a given community, we are entirely within our legal rights in removing from our direct list of customers any customer who by selling our merchandise at less than the prevailing price in that community, thereby destroys the interest of our customers as distributors of our product.

This letter spells combination, cooperation and conspiracy between The American Tobacco Company and groups of its jobbers.

Another form letter indicates the extent to which the activities of the company and the influence of the circular brought about the consummation of price-fixing agreements. This is Exhibit 35 and contains as its last two paragraphs, the paragraphs of the letter last above mentioned. The first two paragraphs, however, are (Rec. pp. 683, 684):

We are in receipt of your letter of _____ and are glad to note that you are interested in Circular No. 2783.

In response to your inquiry, we would state that we believe the list of direct accounts of this company is to-day "cleaner" than it has ever been in the history of the tobacco business. It is our policy here to only sell such legitimate jobbers who serve as

the trade in Philadelphia regarding the meaning of the circular (Rec., p. 389):

Q. What explanation did you make to the trade in Philadelphia regarding circular No. 2783, known as "Commission's Exhibit No. 10"?

A. I explained that our policy would be as follows: Wherever a group of jobbers were selling our merchandise at a price which returned them a satisfactory profit, we would discontinue from our list any jobber in that group who sold at a price under that which was the usual custom, and we would take from our list any jobber outside that group who came into that market and demoralized that condition.

Q. Did you make any explanation of this circular in so far as it might apply to jobbers who were not in your district and who might ship goods into Philadelphia to retailers?

A. Yes; I covered that.

Q. What do you mean, that the answer you just gave covered that situation?

A. Covered that situation; yes.

That the circular was merely the open avowal of a policy that had been previously carried out by the company is a conclusion that can not be escaped when certain correspondence of the officials of the Company is considered. On April 1, 1921, Henry B. Finch, of Minneapolis (Respondent's Exhibit No. 1; Rec., p. 699), in a letter to Mr. Percival Hill complaining about price cutting in Minnesota, asked whether manufacturers might not be willing

to use their good offices to bring about an adjustment that would reestablish regular discounts. This letter was answered by Mr. Hill on April 4th. (Respondent's Ex. 2; Rec., p. 700.) Mr. Hill suggested that The American Tobacco Company would be glad to do what it could to bring about the discontinuance of price cutting; that he did not know just how to go about it and would be glad to have a suggestion from Finch. Hill himself while professing not to know how to go about it, shows in his letter that he does, because he states:

It does seem to me that a conference among jobbers themselves would do more to correct an evil of this kind than any other one method.

Finch was not quite satisfied with this reply, and accordingly wrote him again on April 28, 1921 (Respondent's Exhibit 4; Rec., p. 701), asking whether The American Tobacco Company could assist in correcting the price-cutting situation. When this letter was received Mr. Hill was in Europe, and the letter was answered by Mr. George Hill, vice president of the Company. This letter shows clearly and distinctly the policy of the company in these words (Commission's Exhibit 32; Rec., p. 682):

* * * We feel very definitely here that when jobbers have cooperated and have held such conferences as Mr. Hill has suggested, then the manufacturer can step in by refusing shipments or withholding orders from

the demoralizers, and thereby assist those legitimate jobbers who desire to make a profit. (Rec., p. 682.)

There can be no better expression or description of the attitude of The American Tobacco Company in 1920 and 1921 than those words from that exhibit. Here is a suggestion by The American Tobacco Company to jobbers to get together and fix prices; here are advice and encouragement; here are held out before the eyes of the jobbers the promise and offer of assistance without which price agreements upon the part of jobbers would not be entered into, and without which price agreements, if entered into, could not be maintained.

This, we contend, is price maintenance by combination of dealers and manufacturers condemned by this Court in *Federal Trade Commission v. Beech-Nut Packing Company* (257 U. S. 441, 452) in these words:

By these decisions it is settled that in prosecutions under the Sherman Act a trader is not guilty of violating its terms who simply refuses to sell to others, and he may withhold his goods from those who will not sell them at the prices which he fixes for their resale. He may not, consistently with the act, go beyond the exercise of this right, and by contracts or combinations, express or implied, unduly hinder or obstruct the free and natural flow of commerce in the channels of interstate trade.

This letter (Exhibit 32) was shown to Field Sales Manager O'Boyle, who, in 1921, had charge of The American Tobacco Company's selling forces in the Philadelphia territory. He testified very frankly that the policy of The American Tobacco Company as shown in Exhibit 32 was the policy of the company in Philadelphia in 1921 (Rec., p. 382), that his instructions were to carry out that policy, and that he did carry it out (Rec., pp. 381-383.)

At the risk of obscuring the obvious meaning of his testimony by discussing it, we submit, however, that it signified cooperation between the Association and The American Tobacco Company, for we understand that "assistance" is synonymous with "cooperation." Therefore, the real purpose of The American Tobacco Company in discontinuing the accounts of price-cutting jobbers was not to protect its brands, but was to assist so-called legitimate jobbers in maintaining so-called customary discounts which they themselves had established or might establish by conferences, or, to be more accurate, by agreements. When the cooperation between The American Tobacco Company and the Association is understood in the light of this testimony and in the light of the explanation hereinbefore referred to, which O'Boyle made of the circular (Com. Ex. 10; Rec. p. 672), it meant that the products of The American Tobacco Company could not be bought, for resale in the territory of the members of the Association, at less than the As-

sociation's fixed prices, unless the jobber selling the goods at less than the Association's prices ran the risk of being cut off or suspended from the direct list of the Company.

In addition to the direct suggestions by the president and vice president, respectively, of The American Tobacco Company, made to the jobbers to hold price-fixing conferences, the sales manager, in Commission's Exhibit 44 (Rec. p. 688) made a similar suggestion in these words:

Replying to yours of the 2nd inst., I wish that in the future you would not arrange any meetings for your jobbers. *You should suggest to the jobbers that it is their duty to get together themselves.* (Italics ours.)

We paraphrase this letter in this style: "You tell the jobbers to agree upon prices and that we will help them to maintain them."

Long prior to the issuance of the circular there had existed cooperation between the Association and The American Tobacco Company. As early as October 29, 1920, by reason of a letter written by the Subjobbers Association of Philadelphia to the president of The American Tobacco Company, that company knew of the price agreements of the Association. (Rec. pp. 674, 675.) On March 19, 1921, The American Tobacco Company took occasion to signify its cooperation with the Association in a letter to a member of the firm of Murphy Brothers.

(Com. Ex. 22; Rec., p. 677.) This letter was written by Sales Manager Bevill:

I understand that, according to your association agreement, there are no recognized subjobbers in the city of Philadelphia, and I further understand that you treated all so-called subjobbers on exactly the same basis as you did the retail trade, considering them only in the sense of a retail merchant and sold according to your agreed price, at list less 8%.

If my understanding of this matter is correct and you will advise me that these so-called subjobbers were sold as retail merchants, on receipt of your advice I will be very glad to issue proper instructions to see that you are reimbursed for all such orders sold and delivered by you.

It does not seem that one can escape the conclusion that this letter means cooperation. It certainly is notice that if the Association's price and its regulations had not been lived up to The American Tobacco Company would have refused to reimburse the firm of Murphy Bros.

Although this letter (Com. Ex. 22; Rec. p. 677) on its face proves cooperation, the sales manager who wrote it attempted to deny that it indicated such cooperation or that cooperation was intended or that The American Tobacco Company cooperated with any association; whereupon he was confronted with other letters written by him, one of which (Com. Ex. 1, Nov. 28, 1922; Rec. p. 694)

was written on July 28, 1921, to J. C. Lindner of the Reid Tobacco Company and secretary of the Keystone Tobacco Jobbers' Association, in which it appears that following a complaint made to The American Tobacco Company against the Wirth Cigar Company of Canton, Pennsylvania, that that company was selling at discounts better than those allowed by the Keystone Association, after an investigation made by O'Boyle, The American Tobacco Company discontinued the account of Wirth Cigar Company. This paragraph appears in that letter:

I feel if we can all work together with that spirit of cooperation the future of all legitimate jobbers is assured, and I want you to know that I am ever ready to be of assistance and take action when called on to do so, always, of course, providing we have accurate evidence on which to work.

This sales manager was confronted with another letter which he wrote to the secretary of the Keystone Association apologizing because he and his secretary had overlooked the very important fact of advising him that the Scranton Tobacco Company had been reinstated on the direct list of The American Tobacco Company. This letter (Com. Ex. 3, November 28, 1922; Rec. p. 696) and Exhibit 1, November 28, 1922, were answered in one letter written August 4, 1921 (Com. Ex. 2, November 28, 1922; Rec. p. 695, 696), which shows that on the previous day the secretary of the Association discussed with

O'Boyle of The American Tobacco Company, the cutting off of Wirth Cigar Company. The letter shows that the secretary of the Association informed the sales manager of the American Tobacco Company that he knew Wirth well enough to know that if he gave his word to cooperate he would cooperate by applying for membership in the Keystone Association. The secretary of the Keystone Association, grateful, indeed, for the cutting off of the Wirth Cigar Company, indicates his expectation of the continuation of cooperation in these words:

* * * By all working together we will get somewhere in the near future, and the quicker we can bring the arbitrary jobber to realize that all the larger manufacturers are with us, so long as we are on the right track, just that much quicker will all associations be able to do real work.

We have shown that the record proves from the testimony of Field Sales Manager O'Boyle, the highest representative in authority in immediate touch with the Philadelphia situation, and from the correspondence and testimony of Sales Manager Beville, O'Boyle's superior, that The American Tobacco Company cooperated with the Philadelphia Association; we have also shown from the correspondence of the president of The American Tobacco Company and from the correspondence of the vice president of The American Tobacco Com-

pany that this cooperation was in furtherance of a general policy. All of the testimony referred to and the correspondence, in addition to proving cooperation between the Company and the Association, indicate that that cooperation was in pursuance of an agreement between the Company and the Association. The record, moreover, goes beyond an indication of an agreement, for the testimony of President Hill hereinafter quoted, we submit, establishes beyond any question that he entered into an agreement with the Association to help it to maintain the discounts which it had fixed.

2. PROOF OF EXPRESS AGREEMENT

Upon the making of the agreements by the Association fixing discounts, its president and treasurer made a trip to New York for the purpose of securing the assistance of The American Tobacco Company in the maintenance of the Association's prices. At the conference which Eberbach and Krull, president and treasurer, respectively, of the Association, had with the president of The American Tobacco Company, there was a discussion about general trade conditions, particularly the discounts being allowed by the jobbing trade in Philadelphia. (Rec., p. 360.) Krull and Elerbach informed Hill that different jobbers were allowing different discounts. (Rec., p. 361.) By that expression Krull seems to have meant that certain distributors of The American Tobacco Company in Philadelphia were not living up to the agreement that had

been made, although Krull testified that he did not remember what particular jobbers were discussed in that connection. He testified that he would not say that they did not discuss the discounts being allowed by Seider, Murphy, and Fermani (Rec., pp. 361-362), nor would Krull say that Hill did not agree to assist the Association, nor would he say that neither he nor Eberbach did not ask Hill for the support of The American Tobacco Company. Eberbach testified, "We said so much I do not remember." (Rec., p. 116.) There is no doubt, however, as to what did take place at this interview, although an attempt was made by Eberbach to show that the purpose of the conference was to discuss a particular deal that was then being given by The American Tobacco Company. Perhaps these two gentlemen of the Association did on a certain trip to New York discuss with Hill the extent of a special deal, but Krull and Eberbach made two trips to New York, at one of which no deal was discussed. (Rec., p. 365.) Mr. Hill was examined about the substance of this interview he had with the president and treasurer of the Philadelphia Association. The following testimony of Mr. Hill clearly, we contend, establishes an agreement between Mr. Hill on behalf of The American Tobacco Company and the president and treasurer of the Association on behalf of the Association to help maintain the Association's discounts (Rec., pp. 430-431):

Q. Did you say, however, to Mr. Eberbach and to Mr. Krull, or to either of them, that

you would assist them and other Philadelphia jobbers so that they may be selling under a discount satisfactory to them?

A. I don't know just what form that took.

Q. Now, tell us what you did say to them?

A. I can not tell, of course, what I did say but I probably said that we would cooperate with the jobber, not being able to sell goods at a profit.

Q. And did you also tell him that you would cooperate with the jobber with respect to assisting the jobber in procuring the customary price that prevailed in Philadelphia?

A. I can't remember the conversation, because I don't remember when it occurred.

Q. We are trying to get the substance of the thing.

A. Well, the substance of my conversation to any jobber who came in would be that we would be glad to assist him in getting a profit.

Q. And after your circular (meaning circular 2783) and after your instructions were issued to your field men, did you tell jobbers who visited you that you would cooperate with them in seeing to it that they would be able to sell at the discounts prevailing in their territory?

A. I think the conversation usually took that form, that we would be glad to help you to maintain——

Q. The customary price?

A. No, the satisfactory condition.

• • • • •

Q. Now, to keep specifically as to Philadelphia, the maximum discount of 8% and later 7%, fixed in Philadelphia, was never opposed by you, was it?

A. As a matter of fact, the discount of 8% I know about; I never heard of the 7% being made effective, but I can not imagine anybody doing a jobbing business at a profit with a less profit than 4%.

Q. Well, you did not oppose the 8% maximum?

A. No, we did not oppose it; we had nothing to do with it.

Q. So that, in that respect, that maximum in Philadelphia was satisfactory to your company?

A. Yes, sir.

Q. So, continuing to be specific, did you not say to Mr. Eberbach or to Mr. Krull, or to either of them, that you would assist them, or cooperate with them in selling at a discount of not greater than 8%?

A. I certainly did not.

Q. What did you say?

A. The most—of course, I am not repeating recollection of a conversation—but the most that I said to either of those gentlemen, or anyone else, was that we would assist them in securing a satisfactory profit on the goods.

Q. Now the word "satisfactory" is the one word we seem to be at odds about; when you use the word "satisfactory" do you mean satisfactory to the jobber?

A. Satisfactory to The American Tobacco Company.

Q. What do you say as to the jobber?

A. If it is satisfactory to The American Tobacco Company, it is satisfactory to the jobber.

This testimony made it not only the right but the duty of the Commission to find as a fact:

Said American Tobacco Company knew of the price agreements made by the association and its members as described in paragraph two hereof and agreed with the said association and its members to help them maintain the price agreements described in paragraph two hereof. (Section 2 of paragraph three of findings, Rec., p. 722.)

The making of the agreement admitted by Mr. Hill on direct examination by counsel for the Commission was denied by him on cross-examination by counsel for The American Tobacco Company; and the court below, without mentioning this testimony calls attention in its opinion (Rec., p. 789) to the fact that Mr. Hill was asked upon cross-examination the following question:

Did you, as directing the policy of the American Tobacco Company, ever consciously invite or cooperate in, in the making or carrying out of any agreements among jobbers or retailers that would limit their right to sell your products for what they pleased? and that he was permitted, over objection, to answer "I never have."

There is, therefore, it is true, a conflict in the testimony. The Commission found as a fact that there was an agreement. This ~~fact~~^{finding} we have shown is supported by competent proof, and the court below, either ignoring the competent and legal proof of an agreement, or resolving the conflict in the testimony in favor of The American Tobacco Company, found that there was no proof of an agreement.

This, we contend, the court below had no right to do. The statute provides:

The findings of the Commission as to the facts, if supported by testimony, shall be conclusive.

This finding, therefore, was conclusive upon the court below. It was the intention of Congress that the Commission should be the fact-finding body, and that the Circuit Court of Appeals should not interject its views of the facts where there is a conflict in the evidence.

This Court in *Federal Trade Commission v. Curtis Publishing Company*, 260 U. S. 568, 580, through Mr. Justice McReynolds, said:

Manifestly, the court must inquire whether the Commission's findings of fact are supported by evidence. If so supported, they are conclusive.

And, in a doubting opinion by Mr. Chief Justice Taft in that case, concurred in by Mr. Justice Brandeis, in discussing the conclusiveness of a finding

of fact by the Federal Trade Commission, the former said:

* * * because I think it of high importance that we should scrupulously comply with the evident intention of Congress that the Federal Trade Commission be made the fact-finding body and that the Court should in its rulings preserve the Board's character as such and not interject its views of the facts where there is any conflict in the evidence.

(D) The suspension of Charles Seider from the direct list of the American Tobacco Company

We have hereinbefore shown that the association's investigator found that Charles Seider was allowing discounts greater than those fixed by the Association; that the investigator reported this fact to the Association; and that the Association reported the matter to The American Tobacco Company. (Rec. pp. 81-87.)

In April, 1921, the president and treasurer of the Association requested Seider to join the Association and abide by the discounts which it had fixed. (Rec. pp. 316-317.) He declined to join. He was advised by O'Boyle, field sales manager of the American Tobacco Company to join the Association. His son, Charles Seider, Jr., testified that the substance of O'Boyle's advice was this:

So far as I can recall, he spoke about the conditions that were existing at that time and asked whether we would not comply with the prices that were given out by the association. (Rec. p. 315.)

He declined to join the Association or to abide by its prices and continued selling at discounts which he had been allowing for many years prior to the organization of the Association. Thereupon his orders for goods were inspected by Mr. Hill. (Commission's Exhibit 24, Rec. p. 313.) His orders were not shipped (Commission's Exhibit 26, Rec. p. 679), whereupon he wrote to the company. He received an unsatisfactory reply. (Commission's Exhibit 25, Rec. p. 678.) He wrote again. (Commission's Exhibit 25, Rec. p. 678.) Then he sent his son, Charles Seider, Jr., to New York to ascertain, if possible, why his goods were not shipped. Charles Seider, Jr., was informed that he should see Mr. Bevill, sales manager, who was out of town. (Rec. p. 322.) Shortly after Charles Seider, Jr., returned to Philadelphia from New York, Field Sales Manager O'Boyle came into the Seider place of business and discussed with young Seider the delay in the shipments. O'Boyle advised him and his father to join the Association and stated that he thought it would help them in getting shipments. (Rec. p. 324.) On this advice, Seider saw the vice president of the Association and indicated his willingness to join the Association. Thereupon his goods were shipped by the American Tobacco Company. Seider did not receive any goods from The American Tobacco Company from April 20, 1921, to August 13, 1921. (Commission's Exhibit 26, Rec. p. 679.)

In allowing discounts greater than those fixed by the Association, Seider was not selling at a loss. (Rec. p. 310.) He is one of the oldest tobacco jobbers in Philadelphia, and had been buying from the largest manufacturers since 1876. (Rec. p. 295.) He had always paid promptly for his goods, and there was no question about his credit. (Rec. p. 342.) His account was discontinued according to the testimony of O'Boyle—

For selling merchandise in Philadelphia at less than the prices in effect here by this group of jobbers. (Rec. p. 383.)

This information was given to O'Boyle by an official or executive of The American Tobacco Company. (Rec. p. 383.)

The Commission found (Rec. p. 722) that The American Tobacco Company discontinued selling to Seider for the period from April 20, 1921, to August 13, 1921, for the purpose of assisting the Association and its members in maintaining its price agreements. The court below makes no specific mention of this finding, although its language, which follows, indicates that the finding is supported:

* * * In other words, its (The American Tobacco Company's) policy was to uphold and support the prices of its products as fixed in a particular locality by the wholesalers or jobbers therein. (Name supplied.) (Rec. p. 797.)

This, we contend, is price maintenance by combination, therefore unlawful.

(E) The suspension of Murphy Brothers from the direct list of the American Tobacco Company

To some of their customers, Murphy Brothers allowed discounts greater than those fixed by the Association. They invoiced the goods at the prevailing Association discounts, however, but gave to such customers secret rebates. (Rec. p. 258.) This was found out by the Association's investigator. (Rec. pp. 68, 69, 78, 79.) As a result, the president of the Association remonstrated with Murphy Brothers. (Rec. pp. 216, 217.) This price-cutting activity of Murphy Brothers resulted in their being expelled from the Association. (Rec. pp. 237, 239.) The Association reported the matter to the American Tobacco Company. (Rec. pp. 81, 78.) The account of Murphy Brothers was discontinued by the American Tobacco Company for cutting the Association's prices or discounts. The discontinuance of the account followed a request in writing (Commission's Exhibit 17, Rec. p. 221), dated August 27, 1921, to Field Sales Manager O'Boyle to investigate reports that Murphy Brothers were sell at 10% from list to certain Philadelphia firms, and the report made August 29, 1921, to Vice President Hill. (Commission's Exhibit 19, p. 222.) In his letter of August 27, 1921 (Rec. p. 221), Sales Manager Bevill, after informing Sales Manager O'Boyle that the American Tobacco Company

had been advised that Murphy Brothers were selling certain Philadelphia firms at 10% from list, stated:

Mr. Hill is very anxious to ascertain whether or not this is so, and I would suggest any information you can immediately obtain and send to me will be very highly appreciated.

Commission's Exhibit 16 (Rec. p. 232) is the sales department work sheet of the American Tobacco Company for September 7, 1921, giving the names of new accounts and the names of accounts discontinued. The reasons for the discontinuance follow the names of the firms discontinued. Among the reasons given for discontinuance of the various accounts are the following: (1) Retailers; (2) Credit; (3) Inactive; (4) No cooperation; (5) Sales reasons; (6) Closed out.

As to Murphy Brothers, the following appears:

Murphy Brothers, Camden, N. J. (Sales Reasons).

This firm was cut off from the list of customers of the American Tobacco Company from September 2, 1921 (Commission's Exhibit 20, Rec. p. 223), until October 4, 1921 (Commission's Exhibit 21, Rec. p. 223), which latter date was about the time the Commission began the investigation upon which its complaint in the instant case is based.

The Commission found (Rec. p. 723) that The American Tobacco Company discontinued selling Murphy Brothers for the purpose of assisting the

association and its members in maintaining its price agreements. The court below makes no specific mention of this finding, although its language which follows indicates that the finding is supported:

* * * In other words, its (The American Tobacco Company's) policy was to uphold and support the prices of its products as fixed in a particular locality by the wholesalers or jobbers therein. (Name supplied.) (Rec. p. 797.)

This, again we contend, is price maintenance by combination and therefore unlawful.

(F) The withholding of shipments to Fermani and Blumenthal

Among the names of the firms in addition to Seider and Murphy Bros. reported by Investigator Kane to the executive committee as selling to certain retailers were Blumenthal and Fermani. (Record, pp. 81, 82.) These names, in turn, were reported as we have hereinbefore shown, to O'Boyle, the representative of The American Tobacco Company. (Rec. p. 87.) Shipments by The American Tobacco Company on orders given by these firms were withheld for a period of time. (Rec. pp. 386-387.) The record does not show that the Association or The American Tobacco Company found out that the complaints against Blumenthal and Fermani were justified. Consequently they did not have the same degree of difficulty with their shipments as Seider and Murphy Brothers had with theirs. The record does show,

however, that both of these firms were suspected and accused of violating the Association's agreements, that they were investigated by the Association investigator, that complaints were made to O'Boyle, that their shipments were withheld for a time; and we submit that all of these things support the finding of the Commission as to Blumenthal and Fernani in paragraph 3 (Rec. p. 723) of the findings.

(G) The evidence justifies finding of an implied agreement between The American Tobacco Company and the Association

We have argued (*supra*, pp. 46-52) that the record establishes an express agreement between The American Tobacco Company and the Association. If that part of the record to which we referred (Rec. pp. 430-431) does not establish an express agreement, we submit that the record sustains the finding of an implied agreement, for it establishes —

(1) A visit to New York by the president and treasurer of the association, where they discussed with the president of The American Tobacco Company trade conditions in Philadelphia and Camden. (*Supra*, pp. 46-47.)

(2) That it was the policy of the American Tobacco Company to assist groups of its jobbers in maintaining discounts or prices fixed by such jobbers. (*Supra*, pp. 30-46.)

(3) The employment by the Association of an investigator to discover price cutters. (*Supra*, p. 24.)

(4) Reports by the investigator to the Association of price cutting. (Supra, p. 25.)

(5) Complaints by the Association to The American Tobacco Company based upon these reports. (Supra, p. 25.)

(6) Investigation by The American Tobacco Company of these complaints. (Supra, p. 25.)

(7) Action by The American Tobacco Company as a result of its investigation based upon complaints of the Association. (Supra, pp. 52-58.)

(8) Written threats by The American Tobacco Company to punish price cutters. (Supra, p. 32.)

(9) Requests by representatives of The American Tobacco Company to price cutters to join the Association and to maintain its prices. (Supra, p. 53.)

(10) Refusal by The American Tobacco Company to continue selling to Seider, a price cutter. (Supra, pp. 52-55.)

(11) Refusal by The American Tobacco Company to sell to Murphy Brothers, price cutters. (Supra, pp. 55-57.)

(12) Suspension of shipments to jobbers suspected of being price cutters. (Supra, p. 57.)

(13) Refusal of members of the Association to cut the Association's prices, for fear they would be removed by The American Tobacco Company from its list of distributors. (Rec. pp. 157, 158, 198.)

These things, we submit, justify the finding, by inference, of an agreement. The Commission, we believe, has a province similar to that of a jury,

and so the following language of this court, speaking through Mr. Justice McReynolds, in *Frey & Son, Inc., v. Cudahy Packing Company*, 256 U. S. 208, 210, has particular application:

It is unnecessary to repeat what we said in *United States v. Colgate & Co.*, and *United States v. Shrader's Son, Inc.* Apparently the former case was misapprehended. The latter opinion distinctly stated that the essential agreement, combination or conspiracy might be implied from a course of dealing or other circumstances. Having regard to the course of dealing and all the pertinent facts disclosed by the present record, we think whether there existed an unlawful combination or agreement between the manufacturer or jobbers was a question for the jury to decide, and that the Circuit Court of Appeals erred when it held otherwise.

This court in *Eastern States Lumber Association v. United States*, 234 U. S. 600, 612, by Mr. Justice Day said:

But it is said that in order to show a combination or conspiracy within the Sherman Act some agreement must be shown under which the concerted action is taken. It is elementary, however, that conspiracies are seldom capable of proof by direct testimony and may be inferred from the things actually done, and when in this case by concerted action the names of wholesalers who were reported as having made sales to consumers were periodically reported to the other mem-

bers of the associations, the conspiracy to accomplish that which was the natural consequence of such action may be readily inferred.

In *Federal Trade Commission v. Pacific States Paper Trade Association et al.*, supra, this court through Mr. Justice Butler said:

The weight to be given to the facts and circumstances admitted as well as the inferences reasonably to be drawn from them is for the Commission.

It would seem to follow that the weight to be given to the facts and circumstances proved, as well as the inferences reasonably to be drawn from them is also for the Commission, and that the finding by the Commission of an agreement between The American Tobacco Company and the Association is justified by inference, if not from direct proof.

(H) *The American Tobacco Company, a conspirator*

There is no suggestion by the court below that the members of the Association did not make the price fixing agreements charged. The court indicates that, if these agreements were in violation of law, the Sherman Anti-trust Act and not the Federal Trade Commission Act was violated. These agreements amounted to conspiracies in restraint of trade. The court below agrees with the finding of the Commission that The American Tobacco Company aided the Association in carrying out its fixed prices. The tobacco company is therefore as

much a conspirator as if it had participated in the original conspiracy.

In *Thomas v. United States*, 156 Fed. 897, 912, the Circuit Court of Appeals for the Eighth Circuit, through Judge Adams, stated:

It is earnestly contended that there was not sufficient evidence to connect defendant Taggart with the particular conspiracy charged in the indictment. While the proof does not connect him with the incipency of that conspiracy, it is claimed by the government that facts appear from which it may be reasonably inferred that he came into it after it was connected with full knowledge of its existence and character and with a purpose of furthering its design. If such are the facts, he was as much a conspirator as if he participated in its original formation. *United States v. Newton* (D. C.), 52 Fed. 280; *United States v. Barrett* (C. C.), 65 Fed. 62; *United States v. Cassidy* (D. C.), 67 Fed. 698. * * *

This statement of the law in *Thomas v. United States*, 156 Fed. 897, 912, was cited with approval in *United Mine Workers v. Coronada Coal Company*, 258 Fed. 838; *Rudner v. United States*, 281 Fed. 520; *United States v. Olmstead*, 5 Fed. (2d) 714.

(1) The dismissal of the complaint as to P. Lorillard Company, Incorporated, is not a reason for dismissing the complaint against the American Tobacco Company

The court below intimated that because the Commission dismissed its complaint against P. Lorillard Company, Incorporated, it should have dismissed its complaint as to the American Tobacco Company. Our answer is that the Commission considered that the proof against P. Lorillard Company, Incorporated, was not so strong as the proof against The American Tobacco Company.

The complaint and findings set out an unfair method of competition in violation of section 5 of the Federal Trade Commission Act

(A) Price fixing by agreement is an unfair method of competition

The court below seems, from the language which it employed, to have been of the opinion that the complaint and the findings set out a violation of the Sherman law, but that the Federal Trade Commission does not have jurisdiction to enjoin it as an unfair method of competition. The court used the following language:

The question here is not whether what has been done by The American Tobacco Company constituted a restraint of interstate commerce contrary to the Sherman Law and therefore unlawful. The Federal Trade Commission is not clothed with jurisdiction to hear and determine that question in this proceeding, although clothed with a limited jurisdiction as respects alleged violations of antitrust acts, sections 6-10 of the Federal Trade Act. Its authority to make the order which it entered herein is restricted to matters of "unfair competition." (Rec. p. 803.)

The court seems to have confused unfair competition with unfair methods of competition. It did not apply the definition of unfair methods of competition as defined by this court in *Federal Trade Commission v. Grotz*, 253 U. S. 421, 427, in

which Mr. Justice McReynolds speaking for this Court said:

The words "unfair method of competition" are not defined by the statute and their exact meaning is in dispute. It is for the courts, not the commission, ultimately to determine as matter of law what they include. They are clearly inapplicable to practices never heretofore regarded as opposed to good morals because characterized by deception, bad faith, fraud, or oppression, or as against public policy because of their dangerous tendency unduly to hinder competition or create monopoly. The act was certainly not intended to fetter free and fair competition as commonly understood and practiced by honorable opponents in trade.

We suppose that it is not necessary to argue that price fixing by agreement is in violation of the Sherman Antitrust Act; but the fact that it is a violation of the Sherman Antitrust Act, does not mean that it is not an unfair method of competition in violation of Section 5 of the Federal Trade Commission Act, for it has the result condemned by this court in its definition of unfair methods of competition in the Gratz case hereinabove mentioned.

The opinion of this court in *Federal Trade Commission v. Pacific States Paper Trade Association*, supra, settles the proposition that price fixing is a violation of Section 5 of the Federal Trade Commission Act. The Pacific States Paper Trade Association was a price-fixing organization composed of

wholesale paper dealers. These wholesalers fixed uniform prices at which paper should be sold to retailers in the territory in which the wholesalers did business. Just as the wholesale tobacco dealers in the instant case limited price competition among themselves, so did the members of the Pacific States Paper Trade Association limit competition as to price among themselves. In speaking of the price fixing by the Pacific States Paper Trade Association, this Court said through Mr. Justice Butler:

And, as the contracts between the wholesaler and retailer constitute a part of commerce among the States, the elimination of competition as to price by the application of the uniform prices fixed by the local associations was properly forbidden by the order of the commission.

It follows, we submit, from the opinion of this Court in the Pacific States Paper Trade Association case that price fixing by agreement of the members of the Philadelphia Tobacco Jobbers Association, acting through the association, is an unfair method of competition; that the agreement of the American Tobacco Company to help the association maintain fixed prices is an unfair method of competition; and that the Federal Trade Commission is clothed with jurisdiction to enter the order which it did enter requiring the members of the Association and the American Tobacco Company to cease and desist from using that method of competition.

(B) Price maintenance by combination or cooperation is an unfair method of competition

As we have hereinbefore pointed out, the court below said :

In other words, its policy (The American Tobacco Company's) was to uphold and support the prices of its products as fixed in a particular locality by the wholesalers or jobbers therein. (Name supplied.)

This, we take it, means price maintenance at least by combination or cooperation and price fixing by combination has been condemned by this court in cases arising under the Sherman Antitrust Act, and in the *Beech-Nut case*, 257 U. S. 441, which arose under the Federal Trade Commission Act.

In *Dr. Miles Medical Company v. John D. Park & Sons Co.*, 220 U. S. 373, 408, this court, speaking through Mr. Justice Hughes, declared :

But agreements or combinations between dealers, having for their sole purpose the destruction of competition and the fixing of prices, are injurious to the public interest and void.

In the *Beech-Nut case*, 257 U. S. 441, 452, this Court, speaking through Mr. Justice Day, referring to *United States v. Shradler's Sons, Inc.*, 252 U. S. 85; *United States v. Colgate & Co.*, 250 U. S. 300; *Dr. Miles Medical Company v. Park & Sons Co.*, 220 U. S. 373; and *Frey & Son v. Cudahy Packing Company*, 256 U. S. 208, stated :

By these decisions it is settled that in prosecutions under the Sherman Act a trader is

not guilty of violating its terms who simply refuses to sell to others, and he may withhold his goods from those who will not sell them at the prices which he fixes for their resale. He may not, consistently with the Act, go beyond the exercise of this right, and by contracts or combinations, express or implied, unduly hinder or obstruct the free and natural flow of commerce in the channels of interstate trade.

We submit that in the instant case The American Tobacco Company has gone beyond the exercise of its right simply to refuse to sell others, and that by agreement with the Philadelphia Association, express or implied, by combination with the association, express or implied, by active cooperation with it, it has hindered and obstructed the free and natural flow of commerce in the channels of interstate trade.

This Court, in the *Beech-Nut case*, sustained an order of the Federal Trade Commission entered against the Beech-Nut Packing Company to require it to cease and desist from maintaining resale prices in combination with its jobbers. The combination and cooperation between The American Tobacco Company and the Association certainly is no less than the combination and cooperation condemned in the *Beech-Nut case*.

The opinion of the court below has been criticized by the Circuit Court of Appeals for the Sixth Circuit in *Toledo Pipe Threading Machine Company v. Federal Trade Commission*, 11 Fed. (2d) 337,

where Judge Dennison, speaking for that Court, stated:

The two recent price-maintenance cases in the Second and Ninth Circuit Courts of Appeals (*American Tobacco Co. v. F. T. C.*, 9 F. (2d) 570, Oct. 20, 1925, and *Hills Bros. v. F. T. C.*, 9 F. (2d) 481, January 4, 1926), although distinguishable in details, appear to us fundamentally in conflict with each other. It would seem that the Tobacco Company and the Wholesale Association exercised a concert of action to constrain the price cutters, at least as much as did the petitioner, the Toledo Company, and its distributors in the present case. The discussion by Judge Rogers of the controlling decisions and principles would support the conclusion that the practices of the Toledo Company are lawful. In the *Hills Bros. Case*, the cooperation between petitioner and its customers was no more in kind, though probably greater in amount, than we have here, and the opinion of Judge Rudkin concludes that this kind of cooperation is the thing forbidden by the rule of the *Beech-Nut Case*.

Pointing out this conflict, the court declines to follow the reasoning of Judge Rogers and affirmed an order of the Commission similar in substance to the order of the Commission under discussion here.

In the *Hills Bros. case*, 9 Fed. (2d) 481, 485, the Circuit Court of Appeals for the Ninth Circuit,

speaking through Judge Rudkin, stated of the right of the petitioner:

In other words, what a person may lawfully do individually he may not always do lawfully by combination, or through cooperation with others, and without unduly prolonging the opinion, we will only say that it clearly appears from the testimony that the petitioner has in large measure succeeded in fixing and controlling the retail price of its coffee in interstate trade; that this result has been accomplished, not through individual effort alone, but by combination and through cooperation with its salesmen and customers, and that this latter element renders the method of competition unfair.

The application of the reasoning of this Court and of the other courts in the decisions we have cited, condemns the combination and cooperation between the American Tobacco Company and the Wholesale Tobacco and Cigar Dealers Association of Philadelphia as an unfair method of competition.

(C) *Alleged reasonableness of prices maintained by agreement or combination no defense*

The Commission in its findings did not concern itself with the question as to whether the prices fixed by the Association were reasonable. It considered that the question of the reasonableness or unreasonableness of the prices fixed by agreement or combination does not affect the illegality of the agreement or combination. That it was correct in this view is apparent from the decision of

this Court in *United States v. Trenton Potteries Co. et al.*, supra. That case came to this Court on a writ of certiorari to the Circuit Court of Appeals for the Second Circuit. Mr. Justice Stone for this Court said:

The aim and result of every price-fixing agreement, if effective, is the elimination of one form of competition. The power to fix prices, whether reasonably exercised or not, involves power to control the market and to fix arbitrary and unreasonable prices.

The reasonable price fixed to-day may through economic and business changes become the unreasonable price of to-morrow. Once established, it may be maintained unchanged because of the absence of competition secured by the agreement for a price reasonable when fixed.

Agreements which create such potential power may well be held to be in themselves unreasonable or unlawful restraints, without the necessity of minute inquiry whether a particular price is reasonable or unreasonable as fixed and without placing on the government in enforcing the Sherman law the burden of ascertaining from day to day whether it has become unreasonable through the mere variation of economic conditions.

Therefore, the Commission properly refrained from deciding whether the prices fixed in the instant case were reasonable or unreasonable.

(D) An agreement or combination fixing uniform prices on sales by wholesalers to retailers is illegal even though the prices on sales from retailers to consumers are not fixed by the agreement or combination

If, as in this case, prices from wholesalers to retailers are fixed by agreement or combination, retailers are deprived of their right of competition in purchasing and being thus deprived, it is obvious that their ability to compete with one another as to price is lessened. This the Commission found in this case in Paragraph Four of its findings that :

The aforesaid acts and things done by said respondents and each of them had the tendency and capacity to constrain all wholesale dealers doing business in the territory above mentioned to uniformly sell the aforesaid products to their dealer customers at the prices fixed by the Association and its members as hereinbefore set out and hence to hinder and suppress all competition in the wholesaling of said products in said territory, particularly among the members of the Association and further to *hinder and restrict competition between all retail dealers in said territory.* (Italics ours.) (R. 778.)

The court below, from the fact that the prices at which retailers should resell were not a part of the agreement or combination, distinguished the instant case from the *Beech-Nut Case*. The court states:

The *Beech-Nut case* differs radically from the instant case, in which as before remarked no attempt is made by the American Tobacco Company to compel retail dealers in its prod-

ucts to maintain a price fixed by it in a resale to consumers. (Rec. pp. 802-803.)

In *Sealpar Co. v. Federal Trade Commission*, 5 Fed. (2d) 574, the control of resale prices did not extend to the price charged by the retailer to the consumer. The Commission's order in that case was affirmed. That the distinction made by the court below between the *Beech-Nut case* and the instant case is not justified is pointed out in the *Sealpar* case in which Judge Woods, for the Circuit Court of Appeals for the Fourth Circuit, stated:

We see no escape from holding that the Commission was required to respond to these facts by making the order above recited. The facts are substantially the same as in *Federal Trade Commission v. Beech-Nut Packing Co.*, 257 U. S. 441, 42 S. Ct. 150, 66 L. Ed. 307, 19 A. L. R. 882, except in two particulars. In the case cited the effort to control prices extended to retailers while in this case it did not. This difference, of course, can not affect the principle. In the *Beech-Nut Case* the packages were so marked under a key number system as to enable the Beech-Nut Company's agents to trace to the seller goods sold at less than the fixed price. That, however, was only one of the means of throttling competition, and its absence here does not affect the illegality of the other means to that end condemned by the Supreme Court. As this means was not used in the present case, it was, of course, not enjoined by the Commission. As to those illegal means

condemned by the Supreme Court which were used to suppress competition, the Commission rightly adopted the precise language of the Supreme Court in making its order.

III

It is not necessary for the Commission to find as a fact that a proceeding instituted by it is in the interest of the public

While not expressly stating it, the court below suggests that it is necessary for the Commission in order to enter a valid finding of facts to state in that finding that the proceeding has been justified as being in the public interest. The statute says:

Whenever the commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition in commerce, and if it shall appear to the commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect, and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint.

If the words "to the Commission" had been omitted there might have been room for the contention that the Commission's discretion in the matter was not absolute; but the insertion of these words ap-

pear beyond question to put absolute discretion in the Commission.

A recent decision in point is that of the Circuit Court of Appeals for the Ninth Circuit in *Hills Brothers v. Federal Trade Commission* (decided January 4, 1926), in which the Court said (9 Fed. (2d) 481, 484):

The complaint in this case recites that the commission, in filing the complaint and making the charges, was acting in the public interest, pursuant to the provisions of the Act of Congress; but there was no other or further finding upon that question, and because of the absence of such finding the petitioner contends that the order is erroneous and cannot be sustained.

We cannot agree with this contention. An examination of the statute shows very clearly that the question whether a proceeding by the commission in respect thereof would be to the interest of the public, like the question whether the commission has reason to believe that any person, partnership, or corporation has been or is using any unfair method of competition in commerce, is committed to the discretion of the commission, is to be determined by the commission before proceedings are instituted, and is not thereafter a subject of controversy either before the commission or before the court, except in so far as the question of public interest is necessarily involved in the merits of the case, and, if the Commission finds that the method of competition in question is prohibited by the act,

no other or further finding on the question of public interest is required. *People v. Ballard*, 134 N. Y. 269, 32 N. E. 54, 17 L. R. A. 737.

The petitioner cites *John Bené & Cons v. Federal Trade Commission* (C. C. A.) 299 Fed. 468, in support of its contention, but the decision in that case was based on the testimony, not upon the absence of a finding that the proceeding was to the interest of the public. True, the court called attention to the fact that there was no finding to the effect that the proceeding was to the interest of the public; but we do not understand that the court intended to hold that such a finding was necessary. A finding that the method of competition employed was prohibited by the act covers and includes the question of public interest, and no specific finding on that question is requisite or necessary.

It is interesting to note also that decisions of the highest court of New York construing a statute of that State, almost identical in verbiage to the Trade Commission Act, fully support the Commission's contentions here, and in reason and logic are sound. The decisions referred to construe a provision of Sec. 1808 of the Code of Civil Procedure of New York (now Section 304 of the General Corporation Law) which provides:

Where the Attorney General has good reason to believe that an action can be maintained in behalf of the people of the state
 • • • he must bring an action accordingly

or apply to a competent court for leave to bring an action, as the case requires, if, in his opinion, the public interests require that an action should be brought.

In *People v. Lowe* (117 N. Y. 174, 22 N. E.) the Court of Appeals of New York said, respecting the power of the Attorney General under this provision:

He is to determine in the first instance whether the public interests require an action to be brought; and he may act upon his determination, subject to no control.

Again in *People v. Ballard* (134 N. Y. 269, 32 N. E. 54, 59) the same court said, respecting this provision:

We think that the question as to what the public interests require is committed to the absolute discretion of the attorney general, and that it can not be made the subject of inquiry by the courts.

So to construe the Trade Commission Act is merely to authorize the Commission to determine whether it will proceed, and to remove the possibility that if it should determine not to proceed it may be compelled by mandamus to do so.

It is beyond question that public interest is sufficiently present in the case. For more than a century the courts have refused their aid to enforce combinations or agreements in restraint of trade. Congress in the Sherman law has denounced as unlawful contracts, combinations, and conspiracies in

restraint of interstate trade. In the Clayton Act and the Trade Commission Act it has gone further and prohibited methods which may have a dangerous tendency to hinder competition. It requires no argument therefore to establish public interest in the prevention of agreements and cooperation between manufacturers and dealers, the sole purpose of which, from the standpoint of the public, is to restrain trade.

CONCLUSION

The judgment of the court below should be reversed and the Commission's order affirmed in its entirety.

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Chief Counsel, Federal Trade Commission,

ADRIEN F. BUSICK,
Assistant Chief Counsel,

EDWARD L. SMITH,
Attorneys for Petitioner.

○

End



For brief see volume 11
TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

October Term, 1906

No. 379

FEDERAL TRADE COMMISSION, PETITIONER

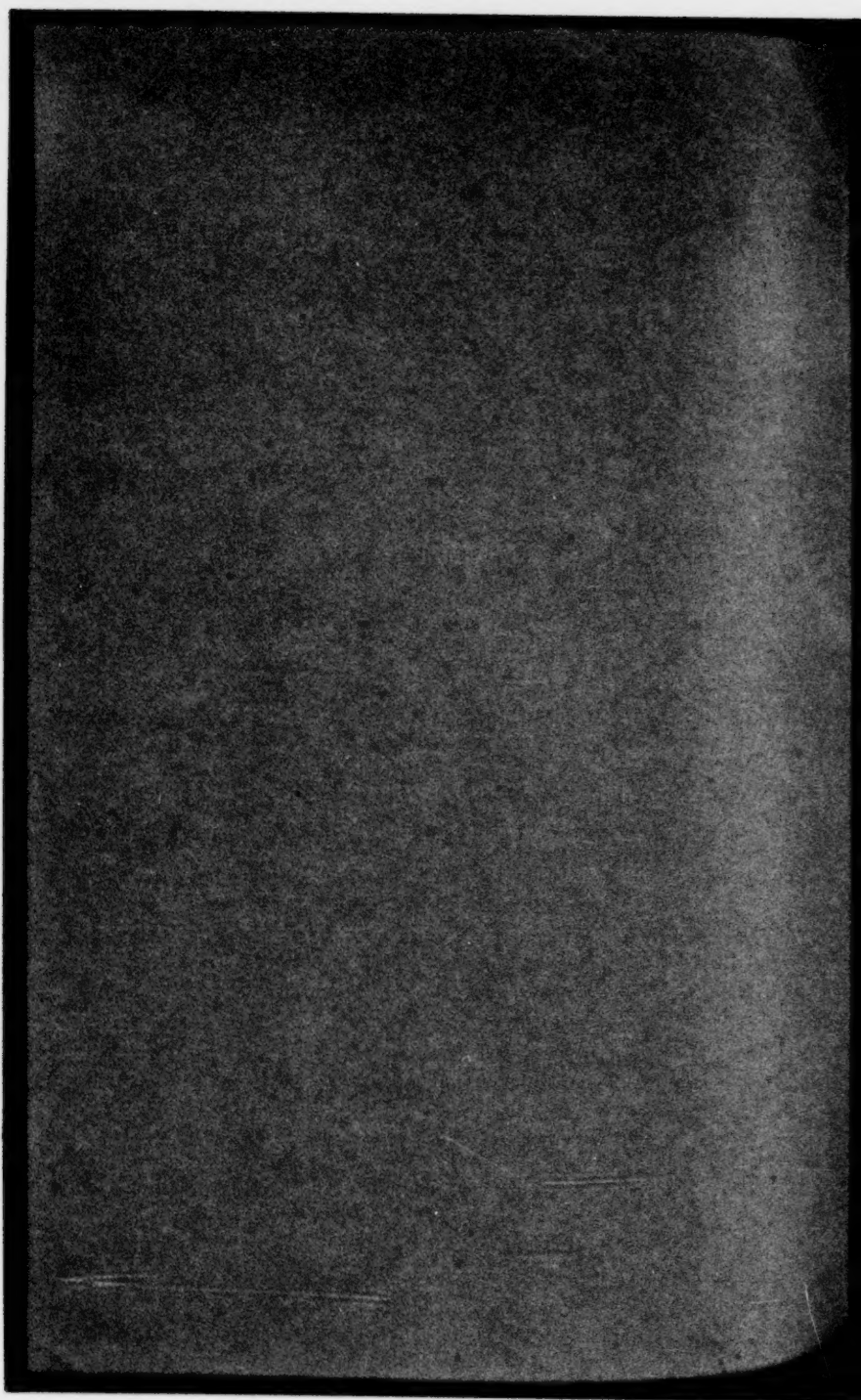
vs.

AMERICAN TOBACCO COMPANY

**WRIT OF HABEAS CORPUS TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE SECOND CIRCUIT**

**WRIT FOR HABEAS CORPUS GRANTED JANUARY 24, 1907
WRIT FOR HABEAS CORPUS GRANTED MARCH 6, 1907**

(51344)



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926

No. 279

FEDERAL TRADE COMMISSION, PETITIONER

VS.

AMERICAN TOBACCO COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE SECOND CIRCUIT

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1 [Secretarys certificate to transcript omitted in printing.]

2 BEFORE FEDERAL TRADE COMMISSION

In the matter of

WHOLESALE TOBACCO & CIGAR DEALERS' ASSOCIATION OF PHILADELPHIA,
Pennsylvania, its officers, directors, and members;

Nelson F. Eberbach, its president; Harvey D. Narrigan and James
Murphy, its vice presidents; Herman J. Krull, its treasurer; Paul
L. Bragan, its secretary, and their successors;

Arthur Shipton, Frank Kuhn, William Cohen, Bennett Holland, Frank
Blatt, H. Stewart Moorhead, Philip Godeski, William D. Shepherd,
and Morris Hochman, and their successors, directors of said associa-
tion and together constituting its board of directors;

3 Nelson F. Eberbach, John S. Eberbach and Joseph H. Eberbach,
partners doing business under the name and style A. R. Cun-
ningham & Company;

Dusel, Goodloe & Company, Incorporated, a corporation;

Philip Godeski and Sidney G. Godeski, partners doing business under
the name and style Franklin Tobacco Company;

Frank Kuhn, George Kuhn and John Kuhn, partners doing business
under the name and style F. Kuhn & Brother;

Peter J. Murphy and John Murphy, partners doing business under
the name and style Peter F. Murphy Company;

Charles A. Krull and Herman Krull, partners doing business under
the name and style Charles A. Krull;

Baum & Neely, Incorporated, a corporation;

4 William D. Shepherd and John G. Shepherd, partners doing
business under the name and style S. Shepherd & Sons;

T. H. Hart and A. I. Mitchell, partners doing business under the name
and style T. H. Hart & Company;

F. Hartmann & Son, a corporation;

Yahn & McDonnell Company, a corporation;

M. Blumenthal;

John Wagner and Joseph W. Wagner, partners doing business under
the name and style of John Wagner & Sons;

Harvey D. Narrigan, an individual doing business under the trade
name H. D. Narrigan & Company;

Victor Fermani;

Anna E. Bechtold, an individual doing business under the trade name
James S. Bechtold;

Frank Blatt;

5 Arthur Shipton and Thomas F. Cooper, partners doing business
under the name and style Shipton & Jnyer Company;

H. S. Moorhead, an individual doing business under the trade name
Duncan & Moorhead;

Bennett Holland;

P. Hochman;

M. J. Dalton Company, a corporation;

Brucker & Houghlen, Incorporated, a corporation;

Fred G. H. Woerner, an individual doing business under the trade
name Fred G. H. Woerner & Sons;

S. T. Banham and A. I. Banham, partners doing business under the
name and style S. T. Banham & Brothers;

E. Cohen and William Cohen, partners doing business under the
name and style E. Cohen & Sons;

6 John Murphy and James Murphy, partners doing business
under the name and style Murphy Brothers;

American Tobacco Company, a corporation;

P. Lorillard Company, a corporation;

Docket
No. 8861

Complaint

Acting in the public interest pursuant to the provisions of an act of Congress approved September 26, 1914, entitled, "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," the Federal Trade Commission charges that the Wholesale Tobacco & Cigar Dealers Association of Philadelphia, Pennsylvania, its officers, directors, members and the various individuals, partnerships and corporations named in the caption hereof, hereinafter referred to as respondents, have been and are using unfair methods of competition in interstate commerce in violation of the provisions of section 5 of said act, and states its charges in that respect as follows:

PARAGRAPH ONE. Respondent, Wholesale Tobacco & Cigar Dealers Association of Philadelphia, Pennsylvania, is a voluntary unincorporated association organized in the year 1920 by and composed of various individuals, partnerships and corporations engaged in the business of selling at wholesale to wholesale and retail dealers cigars, cigarettes and other tobacco products in the State of Pennsylvania and in neighboring States, in some instances doing a retail business in said commodities in addition to said wholesale business, said association is hereinafter called the association. Respondents, Nelson F. Eberbach, Harvey D. Narrigan, James Murphy, Herman Krull and Paul L. Brogan were the original officers of the association, holding the respective official positions set out in the caption hereof. They and their successors have continuously been and are now such officers administering the affairs of the association. Arthur Shipton, Frank Kuhn, William Cohen, Bennett Hollard, Frank Blatt, H. Stewart Moorhead, Philip Godeski, William D. Shepherd and Morris Hochman were the original directors of the association and together constituted the original board of directors. They and their successors have continuously been and still are the directors and board of directors of the association, controlling and directing its affairs.

GROUP I

The following named respondents with their several principal places of business in the city of Philadelphia, State of Pennsylvania, were at all times hereinafter mentioned and still are engaged in selling one or more of the aforesaid tobacco products at wholesale to wholesale and retail dealers in several States of the United States. They cause said products when so sold to be transported from their respective places of business in said city of Philadelphia to said purchasers at various points in various States of the United States:

Nelson F. Eberbach, John S. Eberbach and Joseph H. Eberbach, partners doing business under the name and style of A. B. Cunningham & Company;

Dusel, Goodloe & Company, Incorporated, a corporation organized under the laws of the State of New Jersey;

Philip Godeski and Sidney G. Godeski, partners doing business under the name and style Franklin Tobacco Company;

Peter J. Murphy and John Murphy, partners doing business under the name and style Peter F. Murphy Company;

Charles A. Krull and Herman Krull, partners doing business under the name and style Charles A. Krull;

William D. Shepherd and John G. Shepherd, partners doing business under the name and style of S. Shepherd's Sons;

T. H. Hart and A. I. Mitchell, partners doing business under the name and style T. H. Hart & Company;

Yahn & McDonnell Company, Incorporated, a corporation organized under the laws of the State of Pennsylvania;

M. Blumenthal;

9 John Wagner and Joseph W. Wagner, partners doing business under the name and style of John Wagner & Sons;

Harvey D. Narrigan, an individual doing business under the trade name H. D. Narrigan & Company;

Victor Fermari;

Bennett Hollard;

P. Hochman;

M. J. Dalton Company, a corporation organized under the laws of the State of Pennsylvania;

Brucker & Boghien, Incorporated, a corporation organized under the laws of the State of Pennsylvania;

S. T. Banham and A. L. Banham, partners doing business under the name and style S. T. Banham & Brothers;

E. Cohen and William Cohen, partners doing business under the name and style E. Cohen & Sons.

GROUP II

The following named respondents with their several places of business in the city of Philadelphia, State of Pennsylvania, were at all times hereinafter mentioned and still are engaged in the business of selling one or more of aforesaid tobacco products at wholesale to wholesale and retail dealers wholly within the State of Pennsylvania:

10 Frank Kuhn, George Kuhn and John Kuhn, partners doing business under the name and style of F. Kuhn & Brothers;

Baum & Neely, Incorporated, a corporation organized under the laws of the State of Pennsylvania;

Anna E. Bechtold, an individual doing business under the trade name James S. Bechtold;

Frank Blatt;

Arthur Shipton and Thomas F. Cooper, partners doing business under the name and style Shipton & Payne Company;

H. S. Moorhead, an individual doing business under the trade name of Duncan & Moorhead;

Fred G. H. Woerner, an individual doing business under the trade name Fred G. H. Woerner & Sons.

GROUP III

The following named respondents with their several principal places of business in the city of Camden, State of New Jersey, were at all times hereinafter mentioned and still are engaged in selling one or more of aforesaid tobacco products at wholesale to wholesale and retail dealers in several States of the United States. They cause said products when so sold to be transported from their several places of business in said city of Camden to said purchasers at points in various States of the United States:

11 F. Hartmann & Son, a corporation organized under the laws of the State of New Jersey;

John Murphy and James Murphy, partners doing business under the name and style Murphy Brothers.

All the foregoing respondents whose names are set out in Groups I, II, and III above were at all times hereinafter mentioned and still are members of the association and are hereinafter collectively referred to as the members. In the absence of the acts and things done by them as more particularly hereinafter set out, they were and are naturally and normally in unrestricted competition with each other and with other dealers in aforesaid territory.

Respondent, American Tobacco Company, is a corporation organized under the laws of the State of New Jersey, with its principal office in the city of Jersey City, in said State, and with factories in several of the United States. It was at all times hereinafter mentioned and still is engaged in the manufacture of cigars, cigarettes, and other tobacco products and the sale thereof to wholesale and retail dealers throughout the United States. It causes its products when so sold to be transported from the point of manufacture to said purchasers at points in other States of the United States. Amongst said purchasers are all the respondents set out in Groups I, II, and III above.

12 Respondent, P. Lorillard Company, is a corporation organized under the laws of the State of New Jersey, with its principal office in the city of Jersey City, in said State, and with factories in several of the United States. It was at all times hereinafter mentioned and still is engaged in the manufacture of cigars, cigarettes, and other tobacco products and the sale thereof to wholesale and retail dealers throughout the United States. It causes its products when so sold to be transported from the point of manufacture to said purchasers at points in other States of the United States. Amongst said purchasers are all the respondents set out in Groups I, II, and III above.

Said manufacturers at all times hereinafter mentioned were and still are in competition with each other and with other individuals, partnerships, and corporations similarly engaged in the manufacture and/or sale of tobacco products in interstate commerce except in so far as the same has been limited, prevented, or suppressed by the acts and things done by them and the other respondents herein as more particularly hereinafter set out.

PARAGRAPH TWO. At the time of the organization of the association, the prices at which said manufacturers sold their products were fixed as follows: Said manufacturers severally supplied the members with a schedule of prices denominated "list prices" which were the prices severally suggested by said manufacturers at which their products should be resold by the members to the retail trade.

13 The prices at which said products were sold to the members were fixed by certain uniform discounts off said list in each instance, whereby the members paid to said manufacturers for said products said list prices minus said discounts. Wholesale and retail dealers in tobacco products throughout the United States, including respondent dealers set out in Groups I, II, and III above, then were and still are dependent upon respondent manufacturers for their supply of a large portion of the products in which they deal. The extent of this dependence is such that when any such dealer is unable to secure the products of respondent manufacturers or either of them his business is substantially crippled, and he is placed at a competitive disadvantage with dealers supplied with said products. In the year 1920 the association and its members acting through the association and cooperating and conspiring with it, and with each other, agreed upon a schedule of fixed prices at which the members should thereafter resell to their dealer-customers the products dealt in by the members, including the products of respondent manufacturers, and having thus fixed said uniform resale prices, adopted a system for the maintenance and enforcement of said resale prices by the members and by all other wholesale dealers in the trade who did business within the territory served by the members. Respondent manufacturers cooperated and conspired with the association

and its members and participated in said price maintenance system as is more particularly hereinafter set out. In the course of aforesaid cooperative enforcement of said system, the members and the association through its officers and directors, did, amongst others, and still do, the following acts and things:

(a) Undertook among themselves to maintain said resale prices, and did maintain same.

(b) Caused the fixation of said resale prices to appear as the formal action of the association by an appropriate resolution in that behalf.

(c) Caused the association to notify all members of said action.

(d) Sought by persuasion and intimidation to cause all dealers in the territory above referred to including those members of the

association who discontinued the maintenance of said resale prices in violation of their aforesaid undertakings so to do, to maintain said resale prices.

(e) Sought and secured the cooperation of respondent manufacturers in such persuasion and intimidation, which each said manufacturer rendered by notifying the trade in aforesaid territory, by circular letters and otherwise, that the notifier would refuse to
15 furnish further supplies of his products to any wholesale dealer who failed to resell such products at the prices fixed in aforesaid schedule, or implying the same in veiled language.

(f) Caused reports of the names of said dealers who failed to maintain said resale prices to be reported by the members and their salesmen, either directly to the association, or through the respective members in each instance to the association, and upon receiving such reports, in turn, reported the names of such offending dealers to respondent manufacturers requesting the assistance and cooperation of respondent manufacturers in the enforcement of said system by having said manufacturers refuse to further supply said offending dealers with any of their products.

(g) As a result of reporting said names to the respondent manufacturers and requesting their cooperation, as set out in specification (f) hereof, secured the cooperation and assistance of said manufacturers in that behalf and each said manufacturer upon receiving such information proceeded to investigate said instances of price cutting, and upon finding that the offending dealer was cutting prices, and refusing and failing to maintain aforesaid resale prices, refused to furnish said offending dealer with further supplies of its, the manufacturer's products, until the offender gave such promises
16 and assurances of maintaining said resale prices in the future as were satisfactory to said manufacturers and the association in that regard.

(h) Employed special agents to spy upon the members and other dealers in the aforesaid territory in order to ascertain if any of them were or was failing to maintain said resale prices, and upon discovering that a member or a dealer was so doing, to report the name of such offender to the association. Upon receiving such reports, sought and secured the cooperation of the manufacturers with regard to said offenders in like manner and with like results as set out in specifications (f) and (g).

PARAGRAPH THREE. The aforesaid acts and things done by respondents and each of them had and still have the tendency and capacity to constrain all wholesale dealers doing business in the territory above mentioned to uniformly sell the aforesaid products to their dealer-customers at the prices fixed by the association and its members as hereinbefore set out, and hence to hinder and suppress all competition in the wholesaling of said products in said territory, particularly among the members of the association and further to hinder and restrict competition between all retail dealers in said territory. Respondents' said practices thus tended and still tend

to unduly hinder and obstruct the free and natural flow of commerce in the channels of interstate commerce.

17 PARAGRAPH FOUR. The above acts and things done by respondents and by each of them constitute unfair methods of competition in commerce, within the intent and meaning of section 5 of an act of Congress, entitled "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," approved September 26, 1914.

Wherefore, the premises considered, the Federal Trade Commission, on this 29th day of May, A. D. 1922, now here issues this its complaint against said respondents and each of them.

NOTICE

Notice is hereby given you, Wholesale Tobacco & Cigar Dealers Association of Philadelphia, Pennsylvania, and you its officers, directors and members named in the caption hereof, respondents herein, that the 18th day of July, A. D. 1922, at 10.30 o'clock in the forenoon is hereby fixed as the time, and the offices of the Federal Trade Commission, in the city of Washington, D. C., as the place, when and where a hearing will be had on the charges set forth in this complaint, at which time and place you shall have the right, under said act, to appear and show cause why an order should not be entered by said commission requiring you to cease and desist from the violation of the law charged in this complaint.

18 In witness whereof the Federal Trade Commission has caused this complaint to be signed by its secretary, and its official seal to be hereto affixed, at Washington, D. C., this 29th day of May, 1922.

By the Commission:

[SEAL.]

(Signed)

J. P. YODER, *Secretary*.

BEFORE FEDERAL TRADE COMMISSION

At a regular session of the Federal Trade Commission, held at its office in the city of Washington, D. C., on the 14th day of June, A. D. 1922.

Present: Nelson B. Gaskill, chairman; Victor Murdock, John F. Nugent, Huston Thompson, commissioners.

FEDERAL TRADE COMMISSION
VS.

WHOLESALE TOBACCO & CIGAR DEALERS' ASSOCIATION
of Philadelphia, Pa., et al.

Docket
No. 886

Order granting P. Lorillard Co. extension of time to answer

This matter coming on to be heard upon the application of H. H. Shelton, Esq., counsel for the P. Lorillard Company, one of the

respondents herein, for an extension of thirty days from June 30, 1922, within which to file answer to the complaint in this cause, and the commission now being fully advised in the premises:

20 It is ordered that the respondent, P. Lorillard Company, have to and until the 15th day of July, 1922, within which to file answer to the complaint in the above-entitled proceeding.

By direction of the commission.

[SEAL-]

(Signed)

J. P. YODER, *Secretary*.

BEFORE FEDERAL TRADE COMMISSION

Answer of John Wagner & Sons

JOHN WAGNER & SONS,

No. 233 Dock Street, Philadelphia, June 20, 1922.

FEDERAL TRADE COMMISSION,

Washington, D. C.

Formal No. 886.

GENTLEMEN: We beg to acknowledge receipt of your letter of May 29th enclosing docket No. 886 and other pamphlets. In compliance with your request we reply thereto to the best of our knowledge and belief, giving categorical answers to allegations in your complaint.

21 We joined the Wholesale Tobacco and Cigar Dealers Association of Philadelphia to contribute to the welfare of the local trade. Incidentally, no member or representative of our firm has ever attended a meeting of the association.

ANSWERS

(a) (b) (c) Upon one occasion we received a notice from the association suggesting a certain maximum discount to the trade on cigarettes sufficient to cover overhead. For a time we complied with this schedule of prices, but finding a general practice among the wholesalers to increase this discount (reducing price to jobber) we were forced to compete and meet conditions.

(d) Since receipt of notice above referred to we have never received any communication (except notices of meetings) from the association, either in writing or in any manner. We have never been persuaded or intimidated, neither have we attempted to persuade, intimidate, or dictate to others, nor to our knowledge has such an effort been made.

(e) We have no knowledge of the cooperation of respondent manufacturers engaging in the alleged persuasion and (or) intimidation, and have continued to manage our business in our own way without dictation from either the respondent association of manufacturers.

22 (f) (g) (h) We have not engaged in the practices alleged in these paragraphs and are ignorant of any such action on behalf of or by the association or manufacturers. If any such action were taken at a meeting of the association we have received no report of it.

GENERAL REMARKS

We presume the complaints refer entirely to the handling of cigarettes, which department of our business is conducted for the convenience of customers and for the purpose of holding our trade in imported, Tampa, and domestic cigars. We do not seek business on cigarettes, as the margin is so small it ceases to interest us.

We have, however, experienced in the handling of cigarettes a direct obstacle to trade by the ability alleged by our customers to purchase cigarettes at prices below the manufacturers' price. It is reported to us that such purchases can be made from the excess stocks purporting to have been held by the Government during the war. The restraint of trade caused by this condition is the only restraint or form of intimidation we have suffered from or experienced.

We respectfully pray your honorable commission to remedy this evil, and shall cheerfully cooperate with you in the endeavor to insure to the wholesaler a reasonable, living profit.

Respectfully yours,

(Signed) JOHN WAGNER & SONS.

2 BEFORE THE FEDERAL TRADE COMMISSION

[Title omitted.]

Answer of American Tobacco Company

The American Tobacco Company, for its answer to the complaint herein to the effect that it has been and is using unfair methods in competition in interstate commerce, in violation of the provisions of the act of Congress approved September 26, 1914, entitled "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," alleges as follows:

Answering paragraph 1 of said complaint, this answering respondent—

1. Admits that it is a corporation organized, its principal office is in the city of Jersey City, in said State, with factories in several of the United States; that it is now, and has been for many years last past, engaged in the manufacture of cigarettes and other tobacco products and the sale thereof to wholesale and retail dealers throughout the United States; that it causes its products when so sold to be transported from the point of manufacture to purchasers at points in other States of the United States; and that it is now, and has been for many years last past, in competition with

the respondent, P. Lorillard Company and other individuals, partnerships and corporations similarly engaged in the manufacture and/or sale of cigarettes and other tobacco products in interstate commerce, but denies that said competition is now, or has been, limited, prevented or suppressed by respondent as alleged in said complaint, or otherwise.

2. Further answering paragraph 1 of said complaint, this respondent alleges that it has no knowledge or information of the other matters therein alleged, and can, therefore, neither admit nor deny the same, and if they be material, demands strict proof thereof.

3. Further answering said complaint, this answering respondent alleges that, except as to those matters herein specifically admitted, and those matters of which it has no knowledge or information as herein alleged, it denies each and every allegation of said complaint.

25 Wherefore it prays that the said complaint be dismissed.
 AMERICAN TOBACCO COMPANY,
 By PERCIVAL I. HILL,
 Its President.

JUNIUS PARKER,
 General Counsel, American Tobacco Co.,
 111 5th Ave., N. Y.

JOHN WALSH,
 40½ Southern Bldg., Washington, D. C.,
 Counsel for respondent, American Tobacco Company.

26 BEFORE THE FEDERAL TRADE COMMISSION

[Title omitted.]

Answer of Wholesale Tobacco and Cigar Dealers' Association of Philadelphia and others

The Wholesale Tobacco and Cigar Dealers Association of Philadelphia; Nelson F. Eberbach, its president; Harvey D. Narrigan and James Murphy, its vice presidents; Herman J. Krull, its treasurer; Paul L. Brogan, its secretary; Arthur Shipton, Frank Kuhn, William Cohen, Bennett Hollard, Frank Blatt, H. Stewart Moorhead, Philip Godeski, William D. Shepherd and Morris Hochman, its directors; Nelson F. Eberbach, John S. Eberbach, and Joseph H. Eberbach, partners doing business under the name and style A. B. Cunningham & Company; Dusel, Goodloe & Company, Incorporated, a corporation; Philip Godeski and Sidney G. Godeski, partners doing business under the name and style Franklin Tobacco

27 Company; Frank Kuhn, George Kuhn, and John Kuhn, partners doing business under the name and style F. Kuhn & Brother; Peter J. Murphy and John Murphy, partners doing business under the name and style Peter F. Murphy Company; Charles A. Krull and Herman Krull, partners doing business under the name and style Charles A. Krull; William F. Shepherd and

John G. Shepherd, partners doing business under the name and style S. Shepherd's Sons; T. H. Hart and A. I. Mitchell, partners doing business under the name and style T. H. Hart & Company; F. Hartman & Son, a corporation; M. Blumenthal; Harvey D. Narrigan, an individual doing business under the trade name H. D. Narrigan & Company; Victor Fernani; Anna E. Bechtold, doing business under the name and style James S. Bechtold; Frank Blatt; Arthur Shipton and Thomas F. Cooper, partners doing business under the name and style Shipton & Payne Company; H. S. Moorhead, doing business under the name and style Duncan & Moorhead; Bennett Hollard; P. Hochman; Brucker & Boghien, Incorporated, a corporation; Fred G. H. Woerner, doing business under the name and style Fred G. H. Woerner & Sons; S. T. Banham and A. L. Banham, partners doing business under the name and style S. T. Banham & Brothers; E. Cohen and William Cohen, partners doing business under the name and style E. Cohen and Sons, for their answer to the complaint herein to the effect that they have been and are using unfair methods in competition in interstate 28 commerce, in violation of the provision of the act of Congress approved September 26, 1914, entitled "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," alleges as follows:

1. We admit that the Wholesale Tobacco and Cigar Dealers Association of Philadelphia is an unincorporated association with the officers and membership as alleged in paragraph 1 of the complaint. We aver, however, as hereinafter stated, that the said association is now dissolved.

2. We also admit the principal places of business and character of business of the respondents, other than the American Tobacco Company and P. Lorillard Company, as set forth under groups 1, 2, and 3 of paragraph 1 of the complaint, except we believe John Murphy and James Murphy, partners doing business under the name of Murphy Brothers; John Wagner and Joseph W. Wagner, partners doing business under the name of John Wagner & Sons; Yahn & McDonnell Company, a corporation; Baum & Neely, Incorporated, a corporation, withdrew from membership in the association some time ago.

We aver, however, that the said association, as hereinafter stated, is now dissolved.

3. We believe the averments in paragraph 1 of the complaint as to the incorporation and character of the business of the American Tobacco Company and P. Lorillard Company to be true, except we have no knowledge of any suppression by the American Tobacco Company and P. Lorillard Company of competition in the manufacture and sale of cigars, cigarettes, and other tobacco products in interstate commerce.

4. We deny the averments of paragraph 2 of the complaint as they are made therein and aver that these answering respondents

have furnished to the Federal Trade Commission full information as to the activities of the said Wholesale Tobacco and Cigar Dealers Association of Philadelphia and the officers and members thereof while said association existed, but such activities were not as alleged in the complaint.

5. We aver that for at least four months prior to the filing of the complaint in the above case the Wholesale Tobacco and Cigar Dealers Association of Philadelphia has been practically abandoned and since that time to the present time there has been no associated action, agreement, resolution, or understanding between said association and the officers and members thereof or among the members thereof or any of them in connection with the business of buying and selling cigars, cigarettes, and other tobacco products.

That on June 9, 1922, the said association was formally dissolved.

30 6. We deny the averments contained in paragraph 3 and further aver the averments contained therein are mere conclusions of law.

7. We aver that the averments in the fourth paragraph of the complaint are conclusions of law and require no answer.

Wherefore we pray that the said complaint be dismissed.

Dated June 23, 1922.

Frank Kuhn, jr.; John F. Kuhn; George J. Kuhn; Frank Kuhn Bros.; T. H. Hart & Co.; T. H. Hart; A. L. Mitchell; Bennett Hollard; Frank Blatt; Fred G. H. Woerner; Wholesale Tobacco & Cigar Dealers Association of Philadelphia, Nelson F. Eberbach, president.

Nelson F. Eberbach; Joseph H. Eberbach; John S. Eberbach; A. B. Cunningham & Co.; Harvey D. Narrigan; John F. Murphy; Peter J. Murphy; Peter F. Murphy Co.; John G. Shepherd; William F. Shepherd; S. Shepherd's Sons; Victor Fermani; S. T. Banham & Bros., per A. L. Banham; P. Hochman, per M. Hochman; Brocker & Boghien, Inc., per Louis

31 Fink, secretary; Shipton & Payne Co.; Arthur Shipton, per Thomas F. Cooper; Franklin Tobacco Co. or Philip Godeski; Sidney G. Godeski; E. Cohen & Sons; E. Cohen; William Cohen; M. Blumenthal; Annie E. Bechtold; Dowl, Goodlow & Co., Inc., P. L. Brogan, pres.; H. Stewart Moorhead; Charles A. Krull; Herman J. Krull; F. Hartman & Sons, Inc., J. D. Hartman, secy.

BEFORE THE FEDERAL TRADE COMMISSION
[Title omitted.]

Answer of P. Lorillard Company

P. Lorillard Company, one of the respondents herein, by H. H. Shelton and William B. Bell, its attorneys, answering the complaint herein:

First. Admits that A. B. Cunningham & Co., Dusel, Goodloe & Co., Inc., Franklin Tobacco Company, Peter F. Murphy Company, Charles K. Krull, S. Shepherd's Sons, T. H. Hart & Company, Yahn & McDonnell Company, M. Blumenthal, John Wagner & Sons, H. D. Narrigan & Company, Victor Fermani, Bennett Hollard, P. Hochman, M. J. Dalton Company, Brucker & Boghien, Inc., S. T. Banham & Brothers, and E. Cohen & Sons are concerns located in the city of Philadelphia, Pennsylvania; that F. Kuhn & Brothers, Baum & Neely, Inc., James S. Bechtold, Frank Blatt, Shipton & Payne Company, Duncan & Moorhead, and Fred G. H. Woerner & Sons are concerns located in said city of Philadelphia, Pennsylvania; and that F. Hartman & Son and Murphy Brothers are concerns located in the city of Camden, New Jersey.

That each of said concerns buys and sells tobacco products, and in the course of such business each one of said concerns, except Baum & Neely (Inc.), has been and is a customer of respondent, P. Lorillard Company.

Second. Admits that American Tobacco Company is a corporation organized under the laws of the State of New Jersey, with its principal office in the city of Jersey City, in said State, and with factories in several of the United States; that at all the times mentioned in said complaint the American Tobacco Company was and still is engaged in the manufacture of cigarettes and other tobacco products and the sale thereof throughout the United States, in the course of which it causes a large percentage of its products when so sold to be transported from the points of manufacture to its customers at points in other States of the United States.

Third. Admits that P. Lorillard Company is a corporation organized under the laws of the State of New Jersey, with its principal office in the city of Jersey City, in said State, and with factories in several of the United States; that at all the times mentioned in said complaint P. Lorillard Company was and still is engaged in the manufacture of cigars, cigarettes, and other tobacco products and the sale thereof throughout the United States, in the course of which business it causes a large percentage of its products when so sold to be transported from the point of manufacture to the purchasers thereof at points in other States of the United States.

Fourth. Admits that both said American Tobacco Company and said P. Lorillard Company at all the times mentioned in said complaint were and still are in competition with each other and with

other individuals, partnerships, and corporations similarly engaged in the manufacture and sale of tobacco products.

Fifth. Admits that P. Lorillard Company has from time to time sent to its customers a schedule of prices which is known as its price list, in which is quoted the prices at which, less certain well-known and specified discounts therefrom, the P. Lorillard Company is willing to sell its products to its customers.

Sixth. Denies each and every allegation of said complaint not hereinbefore expressly admitted in so far as said allegations relate to this respondent.

35 Seventh. Denies any knowledge or information sufficient to form a belief of the other allegations of said complaint, not hereinbefore either expressly admitted or denied.

Eighth. And further separately objecting to and answering the complaint herein, respondent alleges and submits that the complaint of the Federal Trade Commission is insufficient in law on the face thereof, and that it does not state facts sufficient to entitle said commission to the relief therein prayed for.

Wherefore respondent demands judgment, dismissing the complaint.

P. LORILLARD COMPANY,
By DAVID H. BALL,
Vice President.

H. H. SHELTON,
Counsel,
Munsey Building, Washington, D. C.
W. B. BELL,
Counsel,
511 Fifth Avenue, New York City, N. Y.

36 BEFORE THE FEDERAL TRADE COMMISSION

[Title omitted.]

Answer of M. J. Dalton Company

M. J. Dalton Company, a corporation, for their answer to the complaint herein to the effect that they have been and are using unfair methods in competition in interstate commerce, in violation of the provision of the act of Congress approved September 26, 1914, entitled "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," alleges as follows:

1. We admit that the Wholesale Tobacco and Cigar Dealers Association of Philadelphia is an unincorporated association with the officers and membership as alleged in paragraph 1 of the complaint. We aver, however, as hereinafter stated that the said association is now dissolved.

2. We also admit the principal places of business and character of business of the respondents, other than the American Tobacco Company and P. Lorillard Company, as set forth under groups 1, 2, and 3 of paragraph 1 of the complaint, except we believe John Murphy and James Murphy, partners, doing business under the name of Murphy Brothers; John Wagner and Joseph W. Wagner, partners, doing business under the name of John Wagner & Sons; Yahn & McDonnell Company, a corporation; Baum & Neely, Incorporated, a corporation, withdrew from membership in the association some time ago.

We aver, however, that the said association, as hereinafter stated, is now dissolved.

3. We believe the averments in paragraph 1 of the complaint as to the incorporation and character of the business of the American Tobacco Company and P. Lorillard Company to be true, except we have no knowledge of any suppression by the American Tobacco Company and P. Lorillard Company of competition in the manufacture and sale of cigars, cigarettes, and other tobacco products in interstate commerce.

4. We deny the averments of paragraph 2 of the complaint as they are made therein, and aver that we have furnished to the Federal Trade Commission full information as to the activities of the Wholesale Tobacco and Cigar Dealers Association of Philadelphia and the officers and members thereof while said association existed, but such activities were not as alleged in the complaint.

5. We aver that for at least four months prior to the filing of the complaint in the above case, the Wholesale Tobacco and Cigar Dealers Association of Philadelphia has been practically abandoned and since that time to the present time there has been no associated action, agreement, resolution, or understanding between said association and the officers and members thereof or among the members thereof or any of them in connection with the business of buying and selling cigars, cigarettes, and other tobacco products.

That on June 9, 1922, the said association was formally dissolved.

6. We deny the averments contained in paragraph 3 and further aver the averments contained therein are mere conclusions of law.

7. We aver that the averments in the fourth paragraph of the complaint are conclusions of law and require no answer.

Wherefore we pray that the said complaint be dismissed.

Dated July 18th, 1922.

M. J. DALTON COMPANY,
By W. R. TAYLOR,
Vice President.

[Title omitted.]

Notice of taking testimony

You will please take notice that on the 16th day of October, 1922, at the hour of 10 o'clock a. m., before the examiner heretofore appointed by the Federal Trade Commission to receive evidence in the above-entitled proceeding, the taking of testimony in support of the complaint in the said proceeding will be begun at the Federal Building, Market Street, in the city of Philadelphia, State of Pennsylvania, and continued from day to day until completed.

And you will further take notice that immediately upon the completion of the taking of evidence in chief for the commission I will move the examiner to proceed at once with the taking of evidence for the respondent.

Dated September 28, 1922.

Respectfully,

W. H. FULLER,

Chief Counsel, Federal Trade Commission,

[Title omitted.]

Order appointing Examiner

Oct. 2, 1922

The above-entitled proceeding being at issue and ready for the taking of testimony:

It is ordered that George McCorkle, an examiner of this commission, be, and he hereby is, appointed and designated to receive and hear testimony and to take evidence in said proceeding.

By direction of the commission:

[Initials.]

(Signed)

OTTO B. JOHNSON,

Secretary.

[Title omitted.]

Order fixing time and place for taking testimony

Oct. 2, 1922

The above-entitled proceeding being at issue and ready for the taking of testimony:

It is ordered that the hearing of the proof of the charges of the complaint in the said proceeding begin at the city of Philadelphia.

Pennsylvania, on the 16th day of October, 1922, at 10 o'clock a. m.

By direction of the commission:

[SEAL.]

(Signed)

OTIS B. JOHNSON,
Secretary.

42 [Secretary's certificate to transcript of testimony omitted in printing.]

43 BEFORE THE FEDERAL TRADE COMMISSION

[Title omitted.]

Statement of evidence

FIRST MEETING—MORNING SESSION

PHILADELPHIA, October 16th, 1922—10 a. m.

Before: George McCorkle, examiner.

[Appearances of counsel omitted in printing.]

44 *Colloquy between court and counsel*

EXAMINER McCORKLE. Are you ready, gentlemen?

MR. SMITH. The commission is ready.

MR. WALSH. Respondents are ready.

THE EXAMINER. Proceed, gentlemen.

MR. WALSH. MR. SMITH, do you propose to take the testimony right now?

MR. SMITH. Yes.

45 MR. WALSH. Before the taking of testimony, the respondent, the American Tobacco Company, objects to any introduction of evidence in this proceeding upon the ground that the complaint does not state facts sufficient to charge violation of section 5 of the act of Congress, approved September 26, 1914, commonly called the Federal Trade Commission Act.

MR. TAULANE. I make the same objection on behalf of the respondents whom I represent.

MR. CALDWELL. The respondent P. Lorillard Company makes the same objection, and also makes and files exceptions and grounds of motion to dismiss the complaint, on behalf of the P. Lorillard Company.

Motion to dismiss

Counsel on behalf of the respondent, P. Lorillard Company, in the above-entitled proceeding, excepts to the jurisdiction of the Federal Trade Commission and moves to dismiss the complaint upon the following grounds:

1. That said act of Congress of September 26, 1914, creating the Federal Trade Commission is in violation of the Constitution of the United States and void in that it deprives this respondent of its property and constitutional rights without due process of law.

By said act a commission is created by which the same individuals are made investigators of fact with unprecedented inquisitorial powers, investigators and prosecutors of complaints to trials of those against whom complaints are made, judges of the facts whose decision thereof is final, and that said act does not afford that opportunity for a fair, impartial, and unbiased hearing which is essential to due process of law and this commission has already made a report dated January 17, 1922, to the Senate of the United States in which it has erroneously prejudged the matters set forth in the complaint.

2. Upon the ground that the complaint herein does not set forth as against these respondents any facts constituting the violation of section 5 of the said act of Congress approved September 26, 1914, creating the Federal Trade Commission and defining its powers and duties and that such charges as are made in said complaint against this respondent are not in violation of law as interpreted by the Supreme Court in *Colgate*, *Frey*, *Schroeder*, *Beechnut*, and other cases.

3. That this respondent had the legal right to stop dealing with any jobber for reasons sufficient to itself and to do so if such jobber was demoralizing its business by the price at which such jobber was selling respondent's products.

4. That these respondents had the lawful right to indicate to its customers in advance its wishes concerning prices at which it thought safe and sound business judgment justified its products being sold to prevent demoralization of its business and to decline further dealings with all those who failed to observe them.

47 5. That especially under the recent decisions of the United States Supreme Court in the *Beechnut* case, which held it is the undoubted right of the manufacturer to specify re-sale prices and to refuse to deal with anyone who failed to maintain the same.

6. On the ground that the unfair method of competition in interstate commerce within the intent and meaning of said act of Congress creating the Federal Trade Commission does not forbid the refusal of the manufacturer to sell its products, if he, the manufacturer, have reasons sufficient to himself, to those he does not deem desirable customers.

7. That there is no warrant in the law within the power of the commission to compel a manufacturer to sell his products to anyone whom he deems for any reason an undesirable customer.

8. Upon the ground that the complaint is insufficient to inform this respondent of the specific facts charging unfair methods of competition.

Mr. SMITH. Mr. Examiner, I suppose that the examiner, as a trial examiner, has no power or authority to dismiss this complaint, and that the question as to whether the complaint alleges an unfair method of competition is only to be passed upon by the commission and not by the examiner.

48 As to the motion made by counsel for the Lorillard Company, while, of course, the examiner I appreciate has no power to dismiss the complaint, the constitutionality of the act has been upheld in Federal Trade Commission vs. Warren, Jones et al. It was later upheld in Federal Trade Commission vs. Beechnut Packing Company and later in Federal Trade Commission vs. Winstead Hosiery Co. I suppose this is not the time or place to argue the motion. I wanted to state my opposition to the motion.

MR. CALDWELL. I ask if there will be a ruling upon the motion?

THE EXAMINER. I will overrule the motion.

MR. CALDWELL. May I have an exception upon each of the grounds stated?

THE EXAMINER. Exceptions granted.

PAUL L. BROGAN, having been called as a witness, was duly sworn by the examiner, and testified as follows:

Direct examination by Mr. SMITH:

Q. What is your address, Mr. Brogan?

A. 112 North 7th Street, Philadelphia, Pa.

Q. Mr. Brogan, where do you live?

A. Glenolden, Delaware County, Pa. That is my home address.

49 Q. What is your business?

A. I am president of the Dusel-Goodloe & Company, Inc., wholesale dealers in cigars.

Q. How long have you been engaged in that business with that company?

A. This is the 10th year.

Q. Did you state what office you hold?

A. President.

Q. And you have been connected with the company ten years?

A. Yes, sir.

Q. How long have you been president of that company?

A. Five years.

Q. Before you became president of the company were you one of its officers?

A. Originally I was not. I have been an officer for the last eight years.

Q. Before you became president of the company what office did you hold?

A. Secretary and treasurer.

Q. How long had you been secretary and treasurer?

A. Three to four years.

Q. Prior to becoming secretary of the company did you hold any office in this company?

A. No.

Q. What are your duties as president of the company and what work do you do in that capacity?

A. Principally executive, in charge of sales and general management of the business.

Q. Is the Dusel-Goodloe & Company, Inc., a tobacco manufacturing or a tobacco selling company?

A. We deal only in cigars at wholesale.

Q. You don't manufacture cigars?

A. No, sir.

50 Q. From whom do you purchase the cigars the company resells?

A. At the present time?

Q. Yes.

A. The Bond Company, Newark, N. J.; Webster Cigar Company, Detroit; American Cigar Company, New York; Spietz Cigar Company; Roy Soirez & Company, New York; those are the principal firms with whom we deal.

Q. How long has it been that you dealt in cigars only?

A. I would say the last eight years; perhaps nine; eight years or more.

Q. You have handled no cigarettes or tobaccos in other form than cigars in that period?

A. That is right.

Q. Have you become familiar during the period you have been with Dusel-Goodloe & Company, Inc., with the number of competitors of your company in Philadelphia?

A. I think I have.

Q. Where does the Dusel-Goodloe & Company, Inc., market its products?

A. Philadelphia, eastern Pennsylvania, State of Delaware, and New Jersey principally.

Q. How does it sell in these places, outside of Philadelphia, with respect to securing of orders and making of shipments?

A. Through our salesmen.

Q. That is, your salesmen travel through Delaware and New Jersey and other places you mentioned soliciting orders that are sent to accepted the goods are shipped from your place in Philadelphia your place in Philadelphia, and there accepted or rejected, and when accepted the goods are shipped from your place in Philadelphia?

51 A. That is the way it is usually handled. We have a branch in Atlantic City that takes care of the business there.

Q. Outside of Atlantic City you handle the business as I have described?

A. Direct from Philadelphia; yes, sir.

Q. How many wholesalers in tobacco products are there in Philadelphia?

A. What are known as wholesalers of tobacco?

Q. I will let you resolve that question in your own mind.

A. Something like 30 I have known of.

Q. Can you tell us who they are?

A. A. B. Cunningham & Company; Charles Krull; E. Cohen & Son; Franklin Tobacco Company; M. Blumenthal; J. S. Bechtold; Peter F. Murphy Co.; Harvey D. Narrigan & Co.; F. Kuhn & Bros.; Shipton & Payne Co.; Fred G. H. Woerner & Sons; Bennett Hollard; Frings Bros. & Co.; Duncan & Moorhead; M. J. Dalton Co.; Brucker & Bogheim; Yahn & McDonnell; S. T. Banham & Bros., Manayunk; Frank Blatt; Victor Fermani—that's about the end of the string, as far as I can recall now.

Q. Mr. Brogan, I will give you a copy of the complaint in the proceeding; will you look at the names of the jobbers in this complaint and see whether you have given us all the jobbers you know of in Philadelphia?

A. I see some others here: S. Shepherd's Sons; T. H. Hart & Company; F. Hartman & Son are Camden—but you don't want Camden; John Wagner & Sons; P. Hochman; Baum & Neely, Incorporated.

52 Q. Do you know where your competitors of Philadelphia market the goods which they sell?

A. Not all of them; no.

Q. Do you know where any of them do, outside of yourself?

A. Where they market all their goods?

Q. Some of them or all of them?

A. I would say all of them market some of their goods in Philadelphia.

Q. Do all of them market some of their goods outside of Philadelphia?

A. I don't know about that.

Q. Do you know any of them who do market some of their goods outside of Philadelphia?

A. Yes.

Q. Who?

A. A. B. Cunningham; Charles A. Krull; Duncan & Moorehead; T. H. Hart & Company; Yahn & McDonnell. Possibly others that I do not recall now.

Q. Do you know how those companies whom you have named as selling outside of Philadelphia market their goods, with respect to shipments and orders?

A. I don't know their method; no.

Q. Do you know whether those companies or some of them have salesmen travelling outside of Philadelphia?

A. I think they have.

Q. Where do those salesmen travel?

Mr. CALDWELL. Mr. Examiner, I wish to object to these questions on the ground that it is apparently not within the knowledge of this witness and only hearsay.

53 The EXAMINER. If he does not know, he need not answer the question.

The WITNESS. I do not know positively where they do business.

By Mr. SMITH:

Q. But you do know those companies do sell outside of Philadelphia?

A. Yes; I think they do.

Q. Do they sell outside of Pennsylvania?

A. I think they do sell in Jersey; yes.

Q. Do you know whether any of them sell in Delaware?

A. I think they do.

Q. Do you know how those shipments are made or those orders secured?

A. No.

Q. Do you know the tobacco wholesalers in Camden, N. J.?

A. Some of them.

Q. Who do you know?

A. Murphy Brothers; F. Hartmann & Son. Those are the only two I know of.

Q. Is that because Murphy Brothers and Hartmann are the largest, or the only jobbers there?

A. They are the largest I know of.

Q. Are there any jobbers besides Murphy Brothers and Hartmann & Son you know of in Camden?

A. I believe the New Jersey Tobacco Company have a distributing house there.

Q. Do you know whether Murphy Brothers and Hartmann & Co. or either of them sell in Philadelphia or Pennsylvania?

A. I have heard Murphy Brothers sell in Pennsylvania. I don't know as to Hartmann.

54 Mr. CALDWELL. I move to strike out that answer as it is hearsay evidence; you may hear anything and it may not be the fact, and I ask that this witness's testimony be limited as to his own personal knowledge as to facts and I move to strike out the testimony heretofore given on what he "thinks" and "what he has heard" as being not competent testimony—on behalf of the Lorillard Tobacco Company.

Mr. SMITH. We will have established here very soon that this witness knows regarding these questions he has been asked. If it later appears in his testimony that he does not, it may be stricken out then.

The EXAMINER. I know the witness used the word "think" but I think he really knew what he was testifying to.

Mr. CALDWELL. I understand to the contrary. Where he knew he so stated positively and where he only thought so, he so stated.

The WITNESS. When I have said I think so, I have heard of it and have some basis for it, but don't know directly.

By Mr. CALDWELL:

Q. You did not mean to intimate you had any personal knowledge by being present and seeing it?

A. I have never seen any made or delivered by Murphy Bros.

55 The EXAMINER. If the witness is only talking from hearsay we will have to rule it out.

Mr. SMITH. If it does not develop later that he knows personally I am agreeable to that.

The EXAMINER. I will reserve my decision until later.

Mr. CALDWELL. And you will give us an exception if you register the decision against us?

The EXAMINER. Yes.

Mr. WALSH. Are the respondents required to take an exception on the record?

The EXAMINER. No; generally in these trials the attorneys have it understood in case they do not object they can later object before the commission.

Agreed that exceptions are saved to all adverse rulings.

By Mr. SMITH:

Q. Mr. Brogan, do you know of an organization known as the Wholesale Cigar and Tobacco Dealers Association of Philadelphia, or an organization of similar name?

A. I do.

Q. Did you have any connection with it?

A. I was secretary of it.

Q. When did you become secretary of the organization?

A. At the time of its organization.

Q. When was that?

A. August, 1920, I believe.

26 Q. Who are the organizers of the association?

A. I believe that practically all of its present members—

Q. Do you have with you the records called for in the subpoena served on you by the Federal Trade Commission?

A. Yes. [Witness produces papers.]

Q. Is not one of these things you have been required to produce the minute book of the association, containing the minutes of the association from August 5, 1920, to January 1, 1922?

A. I believe so.

By Mr. WALSH:

Q. Have you the subpoena with you, Mr. Brogan?

A. Yes.

Q. May I see it?

A. Yes, sir. [Witness produces subpoena.]

By Mr. SMITH:

Q. Will you refer to the minute book of the association?

A. Here it is. [Witness produces book.]

Q. And give us the names of the organizers of the association?

A. I don't have a list of the charter members who were the organizers. I don't have that list with me. I am not sure I have it in my possession at the office, either.

Q. Do I understand it does not appear in the minute book?

A. It does not.

Q. Is there any other place where the record is made of the organizers?

57 A. Yes; all of the charter members or organizers signed the sheet and it is copied in that form.

Q. Where is the "sheet"?

A. I don't know.

Q. When did you last see it?

A. I can't recollect the date.

Q. Can you tell us approximately the date when you last saw it?

A. Early in the year, I would say. Early in this year.

Q. When did you last look for it?

A. I don't know when I looked for it last; I don't remember.

Q. Where was it when you saw it in the early part of the year?

A. Together with the other papers I have.

Q. And where were they?

A. In the desk in my office.

Q. Have you looked in your desk since the early part of the year?

A. Yes; I looked this morning.

Q. To see whether that list was there?

A. I didn't look for this list. I never gave this list a thought.

Q. Would you mind, during recess to-day, making a search for that list?

A. I will be glad to do it.

Q. Will you produce it this afternoon if you find it?

A. Yes.

Q. Can you give us the names of the organizers of the association?

A. Partly at least.

Q. And in giving the names of the organizers, in the event that you name a company or a firm, will you give us the name of the person, member of the firm, or the officer of the com-

58 pany who represented that particular company in organizing the association?

A. Franklin Tobacco Company, Mr. Philip Gordeski; Harvey D. Narrigan & Company, represented by Mr. Narrigan; A. B. Cunningham & Son, represented by Mr. Nelson Eberbach; E. Cohen & Son, represented by Mr. William Cohen; Murphy Brothers, of Camden, as I recall, by both James Murphy and John Murphy were at the meeting; Duncan & Moorhead, represented by Mr. Moorhead; Charles Krull & Co., represented by Herman Krull, and there were others, but I can't recall now definitely who they were.

Q. I will give you this copy of the complaint, Mr. Brogan, and let you see if that helps you to make further answer to these questions?

A. I don't believe it will, simply because my memory won't carry back that far as to who attended the original meeting and who were the organizers. The only guide I would have would be the

list of charter members that bears the signatures of the different firms.

Q. Were there any firms who became members of this organization after the organization was perfected?

A. There were some; yes.

Mr. WALSH. I object to that; the record is the best evidence. Let's see what the record is.

Mr. CALDWELL. I join in that objection.

The EXAMINER. If he knows them I do not see any objection to his telling who they were.

59 Q. Do your records which you have here in obedience to the subpoena of the commission show the names of the members of the organization who acquired membership after the organization?

A. I think they do.

Q. Will you give us such names, and the dates when they became members?

A. September 12, 1921, the following dealers were admitted as members: C. Shapiro, H. Baylen, Fahey Tobacco Co., I. Goldberg & Company, of Pottsville, Pa. That seems to be all.

Q. In the event that you are unable to find the paper containing the signatures of the organizers, would you be willing to state that all of the other members of the organization, excepting those who were admitted on September 12, 1921, were members at the time of the organization?

A. All with the exception of two or three, I think, were admitted shortly after the organization.

Q. Who are they?

A. I would rather refer to my records.

Q. Is there any record which you brought to-day that would refresh your memory on that subject?

A. No.

Q. Well, what records have you in mind in saying you would rather refer to your records?

A. Memorandum on the original list will help me on that.

Q. So that if you are unable to find the original list containing the signatures, you would be unable to give us the names of the members who joined the organization after its organization?

A. Yes.

60 Q. Are there some members of the organization whom you know without reference to the list, who joined after the organization was perfected?

A. None other than the three or four that I read off there.

Q. As to all of the others your present recollection is that all were organizers?

A. No; I said I think there were two or three admitted shortly after organization.

Q. Can you give us the names of those two or three?

A. No.

Q. Then I understand you will not be able to give us the names unless you find the list containing the signatures of the signers?

A. That is right.

Q. What was the date of the organization of this association?

A. August 5, 1920.

Q. Do your records show who presided at the organization meeting?

A. The question was the first regular meeting of the association?

Q. The question was, Do your records show who presided at the organization meeting?

A. The organization meeting was held July 22, 1920. There is some difference in the dates here. The first regular meeting of the organization was held August 5, 1920. The memorandum in the minute book shows the association was organized August 5 but there are minutes here of a meeting held July 22. This was what I would call the organization meeting, when the organization was formed.

Q. I understand there was a preliminary meeting held on July 22, 1920?

A. That is right.

61 Q. Where was it held?

A. Hotel Adelpia, Philadelphia.

Q. Who presided?

A. Mr. H. Stewart Moorhead.

Q. Who is he?

A. He is of the firm of Duncan & Moorhead.

Q. Was anybody present at this meeting held on July 22, 1920, other than the Philadelphia Tobacco Jobbers and Wholesalers?

A. You mean including Camden?

Q. Yes.

A. The records show that Mr. James Murphy, of Camden, attended the meeting.

Q. I am asking you what the records show. I am asking you whether anyone other than tobacco jobbers attended that meeting?

A. Not as I know of, other than Tobacco Journal correspondents.

Q. Who were the Tobacco Journal correspondents that attended the meeting?

A. I don't know; I don't know that any were there unless you refer to a Mr. Meade. I recall him now.

Q. Who is Mr. Meade?

A. Mr. Meade is a tobacco journal representative.

Q. What journal does he write for?

A. Tobacco Leaf, I believe it is, published in New York. He is the Philadelphia representative.

Q. Is he the gentleman who acted as secretary of the meeting held on July 22nd?

A. Yes.

Q. I notice your minutes of the meeting on July 22nd, 1920, state that Mr. Moorhead gave a short talk on the value of a jobbers

organization in Philadelphia and Nelson Eberbach spoke favorably of the project and moved that such an organization be formed immediately, but withdrew his motion. That is correct?

A. Yes.

Q. Is this book which you have been referring to the minute book of the Wholesale Tobacco and Cigar Dealers Association of Philadelphia, organized August 5, 1920?

A. It is.

Q. Does this book contain all of the minutes that were taken?

A. It does.

MR. SMITH. Mr. Examiner, I offer this book in evidence in its entirety and ask that it be marked "Commission's Exhibit No. 1."

MR. WALSH. I object to its admission until we have had an opportunity to examine it. I do not, however, want to take the time to examine it now.

MR. CALDWELL. I object to the introduction of this book in evidence. I do not know what it contains and I have not had an opportunity to examine it. If it contains any reference in any shape or form to the P. Lorillard Co., I object to it as not binding on the P. Lorillard Co., as they were not present and know nothing about it. I have not had an opportunity to examine the book and I ask the examiner not to rule on this until this afternoon some time when we have had a chance to look it over.

THE EXAMINER. I will admit it subject to your objection, because if your company is not in any way responsible it is not evidence against your company.

MR. CALDWELL. Will you rule now that nothing stated in here is binding on the Lorillard Company?

THE EXAMINER. I do not rule that. I admit the minute book subject to your objection. You have stated your objection, and that will save your objection.

MR. WALSH. If the examiner please, I would like to have it understood the American Tobacco Company makes objection to the introduction of the minutes of the association; however, it reserves the right to make a further examination of the book and then to either renew the objection or to withdraw it.

THE EXAMINER. The objection is noted. The book is received as commission's Exhibit No. 1 of this date and the objections of counsel for the respondents noted.

By MR. SMITH:

Q. Mr. Brogan, I notice that the last meeting for which there are minutes is a meeting held on Monday, January 6. On January 6th of what year was that meeting held?

A. 1922 is the correct date.

Q. Have there been meetings of the association since January 6th, 1922?

A. There was a meeting in June of this year, at which time the association formally disbanded.

64 Q. Was there any meeting between January 6, 1922, and the meeting which you spoke of in June when the association was disbanded?

A. No.

Q. I notice you have no minutes of the meeting when the organization was dissolved. Did you keep minutes of that meeting?

A. No; I did not.

Q. I notice that in the minutes of the meeting held August 5, 1920, there is a statement that the constitution as prepared by the committee was adopted. Is that correct?

A. According to the minutes; yes.

Q. Do you have a copy of that constitution adopted on August 5, 1920?

A. Yes; here it is.

Mr. SMITH. The witness, Mr. EXAMINER, hands me a pamphlet which he says is a copy of the constitution adopted on August 5, 1920. I am going to offer this pamphlet after showing it to the gentlemen who represent the respondents.

The EXAMINER. The pamphlet is admitted in evidence as commission's Exhibit No. 2.

Mr. WALSH. The respondent, the American Tobacco Company, will object to any evidence in regard to the organization and activities of the Philadelphia Wholesale Tobacco Jobbers Association unless in some way there is evidence offered by the commission tending

65 to connect the respondent, American Tobacco Company, with such activities, and the American Tobacco Company reserves the right to move to strike out any such testimony if this is not done.

Mr. CALDWELL. I make the same objection on behalf of the Lorillard Company.

Objections overruled; exceptions.

By Mr. SMITH.

Q. Mr. Brogan, will you give us the names of the officers of the Wholesale Tobacco and Cigar Dealers Association of the District of Philadelphia; that is, the officers who were first elected, and if there were any changes in the officers, let us have the changes?

A. Mr. Nelson Eberbach, president; Mr. James Murphy, vice president; Mr. Harvey D. Narrigan, vice president; Mr. Herman Krull, treasurer; and myself, secretary.

Q. How long did Mr. Eberbach continue as president of the association?

A. Up to the time of the disbandment of the association.

Q. How long did Mr. Murphy continue as vice president of the organization?

A. I don't know that Mr. Murphy ever officially resigned although the minutes will give us the date that his firm withdrew from the organization.

Q. Will you refer to your minutes and tell us the date when the firm withdrew from the organization?

A. The formal resignation of Murphy Brothers was announced in the meeting of April 4, 1921.

Q. You say that the resignation was announced at a meeting held April 4, 1921? When was the resignation dated?

A. I don't know. There was no formal resignation that I know of.

Q. No written resignation?

A. Not that I know of.

Q. Who made the statement of Murphy Brothers' resignation?

A. Mr. Elertbach.

Q. When you were speaking of Murphy Brothers, you meant Murphy Brothers of Camden?

A. That is the only firm of Murphy Brothers in the association.

Q. So that you would say Mr. Murphy of Murphy Brothers was vice president of the association from the time of its organization until April 4, 1921; is that correct?

A. Yes.

Q. What office did you say Mr. Narrigan held?

A. Vice president.

Q. How long did Mr. Narrigan continue as vice president?

A. Up to the time of the disbandment of the organization.

Q. Did I understand you mentioned one other?

A. Mr. Herman Krull, as treasurer, and myself as secretary.

Q. How long did Mr. Krull continue as treasurer of the association?

A. To the end of the association.

Q. How long did you continue as secretary?

A. Some period.

Q. You became secretary at the organization of the association?

A. Yes, sir.

Q. What standing committees, if any, did the association have?

A. There was an executive committee, I believe; that was the only committee, I believe.

Q. When was the executive committee formed?

A. September 2, 1920, according to the minutes.

Q. Who constituted the membership of the executive committee formed on September 2, 1920?

A. H. Stewart Monchod, chairman; Frank Kahn, John Murphy, of Philadelphia; Philip Garbush, and William Cullen.

Q. How long did these gentlemen continue as members of the executive committee?

A. I don't recall any change.

Q. You would say then they continued as members of the executive committee until the association was dissolved. Is that correct?

A. As far as I can recall.

Q. I think I asked you before whether there was any standing committee excepting the executive committee and you said there was not?

A. That is correct.

Q. I notice in the minutes of the meeting held September 2, 1929, there are named a finance committee and a membership committee. Is that correct?

A. Yes; I saw that.

Q. So that there was a finance committee and a membership committee?

A. Yes.

Q. Who became the members of the finance committee on that date in September?

A. M. Hochman, chairman; Mr. L. Fink and Mr. James Beck-told.

Q. How long did those gentlemen act as the finance committee?

A. During the life of the organization, I believe.

Q. Who became members of the membership committee on September 2, 1929?

A. Arthur Shipton, chairman; F. Hartmann, and Meyer Blumenthal.

Q. How long did those gentlemen constitute the membership committee of this association?

A. The same period as the other committees, I believe.

Q. What firm of tobacco wholesalers was Mr. Elowitz connected with?

A. A. B. Cunningham Co.

Q. I think you said Mr. Murphy, who was vice president up until April 4, 1929, was a member of the firm of Murphy Brothers, of Camden?

A. That is right.

Q. What firm of tobacco wholesalers did Mr. Narrigan, who was vice president, belong to?

A. Harvey D. Narrigan & Company.

Q. What firm did Mr. Herman Krull, treasurer, belong to?

A. Charles A. Krull.

Q. What firm did Mr. H. Stewart Moorhead, chairman of the executive committee, belong to?

A. Duncan & Moorhead.

Q. What firm did Frank Kuhn, of the executive committee, belong to?

A. F. Kuhn & Son.

Q. John Murphy?

A. Peter F. Murphy & Company.

Q. What firm did Mr. Philip Gordenky, a member of the executive committee, belong to?

A. Franklin Tobacco Company.

Q. What firm was William Cohen, member of the executive committee, associated with?

A. B. Cohen & Son.

Q. What firm was M. Hochman, member of the finance committee, associated with?

A. P. Hochman, I believe it is.

Q. What firm was he connected with?

A. Bruckner & Boghien.

Q. James Bechtold, a member of the finance committee, is associated with what firm?

A. I believe the firm is the same name. I am not positive.

Q. With what firm was Arthur Shipton, of the membership committee, connected?

A. Shipton & Payne.

Q. L. Hartmann, member of the membership committee of the association?

A. F. Hartmann & Co., Camden, N. J.

Q. With what firm was Myer Blumenthal, member of the membership committee, connected?

A. M. Blumenthal, of Philadelphia.

Q. I notice in commission's Exhibit No. 1, which is a copy of the minutes of this association, there was a meeting held at the Hotel Walton December 6, 1920. Was there, in fact, such a meeting?

A. I believe so—according to the minutes.

Q. According to the minutes there was a banquet prior to the business meeting and the banquet was attended by 51 members and guests. Is that correct?

A. I presume so.

Q. You don't have any doubt about it?

A. That is what the minutes say.

20 Q. Was there any representative of any tobacco manufacturing company among the guests at that banquet?

A. Not to my knowledge.

Q. You were there?

A. Yes, sir.

Q. And you say there were none?

A. Not to my knowledge.

Q. I call your attention to the report of the executive committee at the meeting held at the Hotel Walton on December 6, 1920, in which it appears as a part of the report the following: "The committee also made recommendation relative to prices on cigarettes and tobacco. The committee reports were adopted." Was the report of the executive committee made at that meeting as shown by the minutes, in writing?

A. Was the report of the executive committee made at that meeting in writing?

Q. Was the report of the executive committee made at that time in writing?

A. No; not in writing, that I know of.

Q. During the period of this association were there reports of the executive committee made to the association?

A. In writing?

Q. I asked you were there ever any reports made by the executive committee to the association?

A. There may or may not have been. The only way I can tell you is by referring to the minutes. I could not recall.

Q. Will you look at the minutes and inform us whether there were other reports by the executive committee made to the association, except that made on December 6, 1920?

71 A. On one occasion, September 12th, 1921, where the executive committee reported progress.

Q. Progress on what?

A. Reported "Progress"; that is all.

Q. So that as far as the minutes are concerned, the only report shown by the minutes to have been made by the executive committee are two, one reporting progress and one of December 6, 1920, recommending the adoption of a schedule of prices. Is that correct?

Mr. WALSH. I object to the characterization of counsel as to what the minutes show.

Mr. CALDWELL. Objection on the same ground on behalf of the Lorillard Company.

Mr. SMITH. The book is in evidence and it says the committee also made recommendation relative to prices of cigarettes and tobacco.

The WITNESS. The minutes do not say anything about any schedule of prices that I see.

By Mr. SMITH:

Q. Would you be better satisfied if I changed the form of the question as to the description of the minutes of the meeting held December 6, 1920, and describe it as the meeting at which the executive committee made a recommendation relative to prices on cigarettes and tobacco?

A. That is what the minutes say.

72 Q. Now, I will ask you again if the minutes do not show only three reports by the executive committee to the association, two of those reports of progress and the third being as shown in the minutes as of December 6, 1920, a report of the executive committee making a recommendation relative to prices on cigarettes and tobacco?

A. I don't know the meaning of that question.

Q. I will give it again: I will ask you if the minutes do not show only three reports by the executive committee to the association, two of those reports being reports of progress, and the third being the reports shown in the minutes as of December 6, 1920, in which report the executive committee made a recommendation relative to prices on cigarettes and tobacco?

A. I don't get the question yet.

Mr. TAULANE. I object to the question.

The WITNESS. The record is all I can show. That is all I know about it. That is all I see. I will look through again. [Witness examines minutes in Exhibit No. 1.] I see there is mention of four different minutes of reports of the executive committee.

Q. Where are they?

A. There [witness points out sections from minute book]. Three seems to be all. I said four. Three seems to be all.

Q. Do you mean there are four shown by the minutes?

A. No; altogether I only see three.

73 Q. Wasn't there one September 16th which shows that the report of the executive committee was read and adopted?

A. Isn't that one of the three mentioned?

Q. The three I mentioned were two reports of progress and December 6th, 1920? This makes the fourth, doesn't it?

A. This makes the fourth? If there are three others that makes the fourth, yes.

Q. Do you have that report of the executive committee which is shown by commission's Exhibit No. 1 to have been read and adopted on September 6, 1921, with you?

A. I don't recollect ever having had any written reports from the executive committee. That is probably due to the wording of those minutes there.

Q. Although the minutes state the report of the executive committee was read and adopted you don't have the report?

A. I don't recall ever having had any written reports.

Q. Who read the report of the executive committee at this meeting of September 16, 1920?

A. I can't say.

Q. Was there any other committee or board of this association outside of the executive committee, the membership committee, and the finance committee?

A. Any other committee?

Q. Any other committees or boards?

A. There was a board of directors; I believe we had such a thing.

74 Q. Who constituted the board of directors?

A. I guess it is in the minutes there—I don't recall now. "And a board of ten directors: Arthur Shipton, Frank Kuhn, William Cohen, S. T. Banham, Bennett Hollard, Frank Blatt, H. Stewart Moorhead, Philip Gordesky, William Shepherd, and M. Hochman."

(Meeting adjourned for luncheon, to reconvene at 1:30 p. m. in this room, 318 Federal Building, Philadelphia, Pa.)

75 BEFORE THE FEDERAL TRADE COMMISSION

FEDERAL TRADE COMMISSION

VS.

WHOLESALE TOBACCO AND CHUR DEALERS ASSOCIATION of Philadelphia et al.

} Docket No. 886

PHILADELPHIA, October 16th, 1922—2 p. m.

Before George McCorkle, examiner.

Appearances: Edward L. Smith and Edwin B. Haas for the commission; John Walsh, L. A. Speiss, Junius Parker for the American

Tobacco Company, of respondents; Charles Caldwell (Woolworth Bldg., New York) for P. Lorillard & Company, of respondents; Joseph H. Taulane (Stephen Girard Building, Phila., Pa.) for other respondents.

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Docket 886

Met pursuant to adjournment, 2.00 p. m.

Appearances: Mr. Smith for the commission; Messrs. Caldwell, Walsh, Parker, Spiess, and Taulane for the respondents.

PAUL L. BIRGAN resumed the stand, and further testified as follows:

Direct examination (continued) by Mr. SMITH:

Q. Mr. Brogan, you said on your examination this morning that during the recess you would look for the paper signed by the constituent members of the association. Did you look for that paper?

A. I did. After lunch I went to my office and all through my desk and could not find any trace of it.

77 Q. Did you find any copies of it?

A. No; I have one copy of the memorandum of membership at one time. But the original list I do not know what could have become of it. [Witness produces paper.]

Q. I notice on this paper "6. 6"; does that mean June 6th?

A. I don't know what that means.

Q. Do you remember when this memorandum was made?

A. No.

Q. Or for what period it shows the membership of the association?

A. No; I can't tell you that.

Q. Is there any member of the association whose name does not appear on the list?

A. I think that is a complete list.

Q. On this list which you have handed me there is an erasure of the firm of Baum & Neeley and an erasure also of the name of Murphy Brothers.

A. Those firms resigned—they resigned.

Q. But they were at one time members of the association?

A. They were; yes, sir.

MR. SMITH. I offer this membership roll in evidence because it may add to the convenience of everyone concerned because it is in typewritten form.

THE EXAMINER. It is admitted as commission's Exhibit 3.

Q. I understand you to say that you have no reports of the executive committee at all?

A. No reports at all.

78 Q. Were there any written reports made outside of that one of December 6, 1920?

A. I don't think that was a written report. I think it was a typographical error.

Q. You think that is an error?

A. An error in writing up the minutes, I am sure.

Q. What was the recommendation made by the executive committee at the meeting of December 6, 1920, relative to prices on cigarettes and tobacco, which recommendation appears by those minutes known as commission's Exhibit 1?

(Objected to because the record shows itself.)

Mr. SMITH. The record does not show prices. The record shows the committee made recommendation relative to prices on cigarettes and tobacco. This question is, What was the recommendation made by the executive committee?

The WITNESS. I can't testify anything more than what is noted in the minutes there. I don't recollect what it was.

Q. Would it refresh your recollection if I suggested that on December 6, 1920, this association, of which you were secretary, adopted a resolution fixing the resale prices of cigarettes and tobacco at 8% off list?

A. I don't recall the meaning of that resolution at all.

Q. Did this association of which you were secretary at the time, by agreement or resolution, fix the resale prices of the products handled by its members at any percentage—at any discount off list price?

Mr. WALSH. I object to that on behalf of the American Tobacco Company because it calls for a conclusion.

Mr. CALDWELL. I interpose the same objection on behalf of the Lorillard Company.

Mr. SMITH. Whether a price was fixed or agreed upon is a matter of fact and not a conclusion.

The EXAMINER. The objections are overruled and exceptions allowed.

Mr. TAULANE. Are you referring to something in the minutes?

Mr. SMITH. The minutes, Mr. Examiner, speak for themselves. I have no hesitancy in saying that I have some reference to this recommendation of the executive committee approved on December 6, 1920.

Mr. TAULANE. What do you mean by fixed?

Mr. SMITH. I don't know, Mr. Examiner, that I have to give a definition of the word "fixed."

Mr. TAULANE. What I meant was this, are you referring to something in the minutes before you?

The EXAMINER. The gentleman will have to get the book and see.

Mr. TAULANE. He has it—he has it before him there; I don't know what he is referring to. My suggestion is that he is asking for a conclusion.

The EXAMINER. He has a right to ask what was done. I have overruled this.

(Exception.)

By Mr. SMITH:

Q. Did this association of which you were secretary at the time, by agreement or resolution, fix the resale prices of the products handled by its members at any percentage or discount off list price?

A. I don't know whether that is the date, but I know at one time there was a sort of informal understanding that the tobacco products should not be sold at a loss.

Q. Will you answer the question that I asked you?

A. That is what I am trying to do.

Q. I think you can answer that question "Yes" or "No." Then I will ask you about the rest of it.

A. I can't answer "Yes" that a certain thing was fixed. I don't know that it was.

Q. Did this association of which you were secretary ever, by resolution or otherwise, agree that the members of the association would sell tobacco products at any stated price?

Mr. WALSH. That is objected to. In the first place the resolution will speak for itself; and the question calls for a conclusion.

81 (Objection overruled; exception.)

Mr. CALDWELL. I make the same objection on behalf of the Lorillard Company.

(Objection overruled; exception.)

Mr. SMITH. Answer that question, yes or no.

Mr. TAULANE. I suggest, however, that the witness is only obliged to answer yes or no if he is capable.

Mr. SMITH. Mr. Examiner, the witness knows that.

A. He wants me to say yes or no a price was fixed or wasn't fixed. To my knowledge there was no definite price fixed any more than a maximum price which was to allow a certain amount of overhead, taken on an average of the different members.

Q. What was done by the association?

A. After taking the average overheads of the various companies then—

Q. What was done without giving the reasons for it?

Mr. CALDWELL. I submit in all fairness, Mr. Examiner, the witness should be permitted to give his answer as he is doing. He should not be cut short.

The EXAMINER. Proceed to answer the question as best you can.

A. After taking an average of the various overheads of the various company members, it was concluded and found that no one
82 could sell merchandise that didn't net them a profit of 4%; in other words 4% was figured to cover overhead, and if any merchandise was sold at a greater discount it was done at a loss; but all merchandise was not to be sold 8 off or 7 off or any other price off.

Q. Now, you have stated all the reasons, without telling us what you did. State what you did.

Mr. TAULANE. I object to that.

(Objection overruled; exception.)

Q. State what you did.

A. I don't know what answer is required.

The EXAMINER. He asked you what you did.

A. I have stated that the average overhead of the various company members was taken.

Mr. SMITH. I asked what the association did.

A. After that they concluded that a greater discount than 8% should not be given.

Q. And how did the association come to that conclusion; by resolution, vote, or how?

(Objected to on the ground that the question assumes an agreement was formed and the testimony does not show an agreement.)

83 Mr. SMITH. The witness has testified the discount should not be more than 8%.

The EXAMINER. The witness is a very intelligent man. I don't think it is proper to interfere with the examination in chief unnecessarily.

The WITNESS. The minutes say the committee reports were adopted; more than that I don't know.

Q. Do you mean adopted by the association?

A. I presume so.

Q. Do you refer to these minutes taken for December 6, 1920?

A. Yes.

Q. Was there any other action taken by the association of which you were secretary regarding the different maximum or minimum discounts of tobacco selling prices?

A. Regarding a different maximum or minimum selling price? The only thing I know was done was it was concluded not to sell any more merchandise at a loss.

Q. Did you agree after December 6, 1920, to sell at 7% off rather than 8%?

A. That was agreed to sometime.

Q. When was that agreement reached?

A. I can't recall what date that was.

Q. There is nothing in the minutes which shows when you changed the agreed discount from 8% to 7%?

A. No, I don't see any record of it.

Mr. CALDWELL. I object to that question and move to strike out because the question assumes there was an agreed discount and no testimony heretofore given says that there was an agreed discount. The witness testified there was an understanding that they would not do business at less than an amount which would net them a profit and they were at liberty to give any less discount if they saw fit.

The EXAMINER. I think the witness testified in substance that there was an agreement.

Mr. WALSH objects.

The EXAMINER. You can bring that out on cross-examination.

By Mr. SMITH:

Q. Why wasn't it put in the minutes of the association—the record of the change of the agreed discount from 8% to 7%?

A. I really don't know. I didn't attend all meetings. The minutes were not always written up by myself.

Q. But you did know that the agreed discount had been changed from 8% to 7%?

A. I heard of it, but at no time was there a set discount. Some firms at 7% overhead; another 3% and another 4% and another 5%, and the discount as far as that was concerned varied right through.

Q. Did you consider it was necessary for you to make all that speech in answer to my question with reference to the change from 8% to 7%?

(Objected to.)

85 Q. Would it refresh your recollection if I suggested to you that the change of the agreed discount from 8% to 7% took place in June, 1921?

A. No; it will not. I don't recollect.

Q. Do you have with you a report which one L. T. Cowie, an examiner of the commission, had with you in Philadelphia in September, 1921?

A. Yes.

Q. I will ask you to look at the copy of the report, particularly to the first question and answer and ask you whether that report now refreshes your memory as to when the agreed discount of 8% was changed to 7%?

A. That is what is stated here on this sheet.

Q. I asked you if that refreshed your memory as to when the change was made? Does it refresh your recollection?

A. The only thing I can go by is what is stated here. I don't recall from my memory as to when there was any change talked of.

Q. After having read the report of Mr. Cowie of the interview between you and Mr. Cowie, what was the date when the agreed discount was changed from 8% to 7%?

(Objected to by Mr. Taulane.)

(Objection overruled.)

The EXAMINER. He knows if it refreshes his memory. If it doesn't he can say so.

The WITNESS. I don't recall when there was a change or contemplated change or anything about it.

86 Q. The change from 8% to 7%?

A. I don't recollect any date; no.

Q. Doesn't that copy of the report of the interview of yours with Mr. Cowie refresh your recollection that it was around June 20th?

A. After reading this I would say yes. I don't know whether this is correct or not.

Mr. TAULANE. You didn't prepare that?

The WITNESS. I didn't prepare that; I never read it over.

Mr. SMITH. I object to the side questions.

Mr. TAULANE. I think it is only fair to the witness it should be understood he didn't prepare that thing, and he has not seen it until it was handed to him.

The EXAMINER. That is all on the record.

By Mr. SMITH:

Q. Mr. Brogan, how are the retail prices of tobacco products arrived at, so far as the retailer is concerned? I am not speaking of the manufacturing prices but the selling price?

A. How are the prices to the retail dealer? I don't know how they figure here.

Q. When your association agreed upon a maximum discount, first of 8% off of list, what did that mean as far as the price to the retailer was concerned?

A. What did it mean so far as the retailer was concerned?

Q. Yes.

A. It gave him the cost of his merchandise.

Q. What did the 8% discount mean; discount from what?

A. It meant he was getting in a way a special discount of 8% off the manufacturer's list.

Q. Is that how the tobacco is sold—by list?

A. I don't know a great deal about the cigarette and tobacco business. My firm don't handle it and have not for 8 years and what I know is gathered outside.

Q. You gathered some information as secretary, to take into this association?

A. I never gave it much time.

Q. Did you learn there are list prices of tobacco products?

A. I have heard that, yes.

Q. So that the price fixed by the association was 8% off of a list price suggested by the manufacturer?

A. Yes.

Q. The tobacco manufacturers, as I understand it, furnished list prices?

A. As far as I know, yes.

Q. And all the prices in the tobacco trade have a bearing on the list price and are fixed at discounts from the manufacturer's list price?

A. As I understand, for instance, if a cigarette lists at \$8 a thousand, I understand the discount 8 and 2 or 10 and 2 was supposed to be the jobber's profit for distributing that merchandise.

Q. In other words, if a tobacco product was listed at \$8, for illustration, that meant the retail price was \$8 for that quantity?

A. No, sir. That would be the cost—intended to be the cost to the retail dealer.

Q. And not the ultimate users' price?

A. No.

Q. Did the price mean the price that the dealer charged the retail user?

A. No.

Q. What were the prices or discounts allowed all the members of the Philadelphia Wholesale Tobacco and Cigar Dealers Association before the association fixed the maximum discount at 8%?

A. I really don't know.

Q. What, as secretary of the association, did you learn were the discounts being allowed by the different jobbers?

A. I heard as much as 10 and 2 and 10 and 1 and 10—all kinds of prices.

Q. Were there any reports in writing made by the executive committee to you as secretary of this association but not to the association?

A. I don't know of any.

Q. In going over this minute book this morning, commissioner's Exhibit No. 1, I noticed the adoption of a motion directing the certain officers of the association to call upon officials of the Reynolds Tobacco Company. Do you remember what meeting that was?

A. A resolution to that effect? There is some memorandum of that in there. I don't recall when that meeting was, no. April 4, 1921—but there was no resolution passed at that time. "Moved and passed that a committee of two be appointed."

Q. The minutes of the meeting held on April 4, 1921, show, do they not, that it was moved and passed that a committee of two be appointed to call on R. J. Reynolds Company at the expense of the association?

A. Yes.

89 Q. Who were appointed on that committee?

A. There never was any committee appointed that I know of. I don't think it ever went any further than that.

Q. You would have us understand that, although it was ordered that a committee of two was appointed to call upon the R. J. Reynolds Company, no committee was appointed?

A. No committee was appointed.

Q. Was there ever anything said at any meeting of the association by any member or by anyone representing a corporation or firm or partnership, in the association, regarding any meeting at any time or any place with officials of any tobacco manufacturing company?

Mr. CALDWELL. I object to that on behalf of the Lorillard Company. It is not competent, it is immaterial and irrelevant, and not binding in any way on the Lorillard Company. It is hearsay testimony.

Mr. SMITH. This question calls for an answer, yes or no, first.

The EXAMINER. I will state I think it is incompetent, but the witness is permitted to answer.

Mr. WALSH. Same objection interposed on behalf of the American Tobacco Company.

Mr. SMITH. There isn't any attempt here to put in anything in this record that ought not be there by the strict rules of evidence. I think these gentlemen on the other side are forgetting the

90 allegations in this complaint. If they keep them in mind, this question is perfectly proper. This complaint charges in Paragraph II, in describing the means of carrying out the illegal acts alleged in the complaint, subdivision (c), which says that the members of the association sought and secured the cooperation of respondent manufacturers in such persuasion and intimidation, and so forth. I can't see why it is incompetent to show any agreement or cooperation in view of the language of this complaint.

Mr. PARKER. I would like on the record to ascertain what is the purpose of Mr. Smith and how far he seeks to go. Undoubtedly, it is not competent for this witness to say yes or no to that question. Supposing he says someone else reported to the association what a representative of the American Tobacco Company said to these respective gentlemen. It is assumed that what was said by them at the meeting without they being called shall be competent testimony against the American Tobacco Company? If so, that is the greatest hearsay testimony in the world.

The EXAMINER. I think the matter is incompetent, Mr. Smith.

Mr. SMITH. I will just waive the question.

91 By Mr. SMITH:

Q. Mr. Brogan, did the association at any time send anybody to interview representatives of any tobacco manufacturing companies? Answer that yes or no, if you please.

A. No, sir.

Q. Did any member of the association ever say at a meeting, or report in writing, that he had interviewed officials of any tobacco manufacturing company at any time?

Mr. CALDWELL. I object to that on the ground it is pure hearsay.

Mr. WALSH. The same objection is interposed as to the American Tobacco Company.

(Objection overruled. Exceptions.)

A. No.

Q. After your association had agreed upon the maximum discount of 8%, what if anything, by way of notice to the members of the association was done by you?

A. I never sent any notice to anyone.

Q. Did you cause notices to be sent to anybody?

A. No.

Mr. SMITH. Mr. Examiner, I have a paper here which I will ask to have marked "Exhibit No. 4," for identification, about which I am going to ask the witness.

92 Q. Mr. Brogan, I show you a paper which has been marked "Commission's Exhibit No. 4," for identification, being a type-written paper entitled, "Philadelphia County and City of Camden." Will you tell us what that is?

Mr. TAULANE. I object to that; it speaks for itself.

(Objection overruled. Exception.)

A. I don't know that I ever saw that before.

Q. Was there anybody connected with the Wholesale Tobacco and Cigar Dealers Association of Philadelphia who sent out circulars?

A. I think the members may have; I don't know.

Q. Who were employed in the office of the secretary of the association at 112 and 114 N. 7th Street, Philadelphia?

A. By the Tobacco Jobbers Association?

Q. Yes; at the office of the secretary?

A. No one.

Q. Did you ever see any letterheads or envelopes used by the association?

A. Yes.

Q. I will show you commission's Exhibit No. 3, for identification, and ask you if that address is on the envelope of the Philadelphia Cigar Dealers Association?

A. Yes.

Q. On the upper left hand corner appear the words "Office of the Secretary, 112-4 N. 7th Street, Philadelphia"?

A. Yes, sir.

Q. Do I understand you to say your office was not there?

A. That is the office of my firm.

Q. And I understand you to say that this paper which is
95 known as commission's Exhibit No. 4 for identification has never been seen by you before?

A. I don't recall ever seeing it before.

Q. Was any other paper of similar import seen by you?

A. I don't recollect any. There may be some out.

Q. Did you yourself ever get an announcement of discounts agreed upon by the association of which you were secretary?

A. I am sure I never did.

Q. Did you ever prepare any?

A. I don't recollect ever having prepared any; no.

Q. If announcements of prices had been sent out any time while you were secretary, who, if you did not, sent them out? Whose business would it have been to send them out?

A. I don't know. It would be my duty primarily. Who would follow I don't know.

Q. Do you remember addressing any correspondence of any kind to John Wagner & Sons, 233 Dock Street, City (meaning Philadelphia)?

A. It seems to me I acknowledged something from them at some time. I believe it was in relation to their membership, if I am not mistaken.

Q. You do?

A. Yes; here's a copy of the communications with them [witness produces copies of letters].

Q. You say you did or did not address this envelope to John Wagner & Sons?

A. I am sure I did not, and I don't think I directed anybody to do it.

Q. Did you ever request anybody or direct anybody to send to members of the association notices of any kind?

A. I have of some kinds; yes.

Q. What kinds of notices have you requested or directed someone to send?

A. I had the secretary of our company send out when we had our monthly meetings, notices on postal-card form and sometimes in letter, I believe.

Q. Is there any kind of notice you had the secretary of your company send out to anybody?

A. Not as I can recall.

Q. Who is the secretary of your company whom you requested to send out those notices from time to time?

A. John E. Dingley.

Q. Where does he live?

A. I don't know his street address. You can address him at 1117 N. 7th Street. He has just recently moved and that is the address I don't know his street address.

Q. I show you typewritten paper entitled on the top "Notice" and underneath the words "the 3rd of November on Tuesday, November 2nd, 1910, at 8 o'clock, P. M." Did you ever see that notice or copies of that notice before?

A. I don't recall it; no.

Q. Did you ever send out any notices of that import to members of the association?

A. Of a similar nature? There may have been some of them. I don't recall any of any particular notices or plans.

Q. Do you say that because it was your position to send out notices to the association's members?

A. No, sir; it was not a position as far as I know.

Q. You never sent any out and never caused any to be sent out?

A. I can't recollect any; no.

Q. None of those entitled for identification—Nos. 8 and 9—on the notice I have shown you, you sent out or were responsible for in any way. Is that correct?

A. I don't know of any.

Q. You said you don't think you were responsible for the sending of those notices?

A. Neither do I think I sent any out.

Q. Are you sure you didn't send any out?

A. To the best of my memory.

Q. Is your memory good today?

Now—on—

A. Fair; that's all.

Q. Mr. Draper, since your minutes of the meeting held on February 7, 1921, show that the president of your association introduced Mr. Ashury Davis, of Baltimore, I am prompted to ask you who Mr. Ashury Davis is?

A. About all I can tell you he is in the right and tobacco business in Baltimore. I met him at that time, but never before.

Q. Is he a wholesaler?

A. Wholesaler.

Q. What did Mr. Davis have to say to you?

Mr. Chairman, I object.

A. We had a banquet on that date.

Q. What did Mr. Davis say on that occasion?

(Suggested to by Mr. Caldwell.)

(Objection overruled.)

(Exemption.)

Q. A. I don't believe I can tell you what he said. I don't remember. As I recollect it was simply he made a little talk over our banquet. He went over a lot of different things.

Q. You didn't have any banquet February 7th, 1921, at 9 o'clock in the Walden Apartments, did you?

A. I thought Mr. Davis was with us at the time we had our banquet at the Hotel Walden—might I see that minute book? (Witness examines book.) I guess I am wrong about the banquet part of it. That was a very interesting and instructive address.

Mr. Foreman, I object on the part of the respondents.

The Witness. I don't recollect what the man said.

Q. You don't recall what he said?

A. No.

Q. Do you recall anything he said?

A. No.

Q. In this instructive and constructive address, do you remember any of it?

A. I don't recall anything he said; no.

Q. Do you remember he suggested that your association cooperate with the Association of Wholesale Tobacco Dealers in Baltimore?

A. I would not say that he did.

Q. You wouldn't say that he didn't, either?

A. I would not say that he did. I would not say that he didn't.

Q. Was there any other time that he said it?

A. Not to my knowledge. That was the only time I met the gentleman.

Q. Did Mr. Davis, in the course of his instructive talk, suggest that you not allow any greater discounts in the territory covered by the Baltimore wholesalers than the Baltimore wholesalers allowed?

Mr. Foreman, I make the same objection to this question.

(Objection overruled.)

(Exemption.)

Q. Did he make that suggestion?

A. I don't recall. He may have. I believe he told us somewhat of the conditions in Baltimore.

Q. It appears from your minutes that a meeting at the Gladstone on March 7, 1921, there was a discussion on price cutting by subjobbers and others. Who were among the "others," excepting the subjobbers, who were discussed because of price cutting?

A. The discussion on price cutting by subjobbers and others—

Q. Who were the persons other than subjobbers who were discussed because of price cutting?

A. I would not want to name anyone for fear I didn't name the right one.

Q. I am speaking of the "others."

A. I am speaking of the others whom I refer to as first line jobbers.

Q. Which of the price cutters of the first line jobbers did you discuss because of their price cutting?

A. I don't recall which ones were mentioned. I would say I would be afraid to mention anyone for fear I didn't name the right ones.

Q. Was that because there were more than one discussed?

A. There are liable to have been more than one discussed;

Q. You hesitate to mention any particular one because you feel you might not name the party whose price cutting was discussed?

Mr. WALSH. Objected to. There is nothing in the minutes to say anyone was discussed. It doesn't appear anyone was discussed.

Mr. SUTTON. The minutes show a discussion on price cutting by subjobbers and others. I want to know who the others were.

A. I don't recall who they were, if there were any.

Q. What employees of the association did it have, if any?

A. What employees did it have? Why, we had a fellow called the special investigator or something like that.

Q. Who was he?

A. Mr. Kane was the name of one man. That is the only one I know.

Q. Do you mean there may have been some others you didn't know?

A. I don't know. That is the only one I know of.

Q. What were his duties? What was he?

(Objected to by Mr. WALSH. It doesn't appear yet the witness knows what his duties were.)

Mr. SUTTON. Mr. Examiner, this man is the secretary of the association.

THE EXAMINER. Proceed and answer the question.

A. He was employed—my understanding of it was—to look into complaints that were made as to price conditions, stolen merchandise, of which there was a great deal of complaints that there was merchandise coming from out-of-town sources which no one seemed to know where; they were the principal things I know of.

Q. You said one of the things he was employed for was to check some complaints as to price conditions. What did you mean?

A. When a man would say—one jobber might say that another jobber was getting 10 off or 10 and 2 off; there were all sorts of wild complaints made at times. This man endeavored to check up on them and find out the foundation for that.

Q. When was Mr. Kane employed?

A. I don't know. I don't know if it isn't stated in the minutes.

Q. It was after the association had agreed upon a maximum discount of 8%, was it not?

A. I presume it was some time after that.

Q. Wasn't it his duty to see to it, or investigate complaints where it had been charged that some of your members of the association were not living up to the agreement? Wasn't that what he was hired for? Will you admit that was one of the things he was hired for?

A. I testified to that, I thought.

Q. Was that what you meant when you gave these purposes for his hiring?

A. Yes.

100 Q. Name the tobacco wholesalers whom Mr. Kane investigated?

MR. WALSH. I object to that because it doesn't appear he knows.

MR. SMITH. If he don't know he can say so.

THE EXAMINER. If he knows it I think he ought to answer.

A. I have no record showing who he investigated or didn't investigate.

Q. I didn't ask you what your records show. I asked you whom he investigated and whom he reported on.

A. He never reported on anyone to me and I don't know of anyone he investigated.

Q. Did he report about anyone to the association or officers of the association?

A. I don't know what he might have reported to someone else.

Q. Did he ever make any reports to you as secretary of the association?

A. No.

Q. Did you as secretary of the association learn of the names of the firms that Mr. Kane investigated?

MR. TAGLARE. I object to that.

MR. SMITH. That is part of the conspiracy.

THE EXAMINER. I think it will simply be carrying out the charge of the complaint. I think it is proper to ask that question.

101 A. I don't know whom he investigated.

Q. I didn't ask you that. I asked you if you had heard from any of the members of the association who had been investigated by Mr. Kane?

A. I heard a lot of things but most of them were wild rumors.

Q. Will you answer the question I just asked?

Mr. CALDWELL. I object on the ground that it is hearsay and not binding upon the Lorillard Tobacco Company.

The EXAMINER. If he heard it in his official capacity as secretary I will let him tell it.

A. Yes, I heard of some.

Q. Who were they?

A. Murphy Brothers of Camden; M. Blumenthal and Company, I believe, on South Street, Philadelphia.

Q. Who else did you learn were investigated by Mr. Kane?

A. E. Cohen & Son. There were possibly others. I would not want to mention any names. There are so many things that were said I can't recall.

Q. Was Charles Krull another that you learned had been investigated?

A. I might say that sometime or other, in some way or other, practically everybody in the association was accused more or less.

Q. I will ask you again whether Charles Krull had been investigated?

A. I don't recall that definitely.

Q. Was P. Hochman one of the jobbers who had been investigated by the association for not standing by the prices agreed upon?

A. I was asked originally whether I heard of any complaints of certain jobbers. Krull, I don't recall anything definite of him.

Q. You have mentioned Blumenthal as being one. What do you say as to B. Fermani?

A. Yes.

Q. What did you hear of him?

A. I heard he was giving various discounts.

Mr. CALDWELL. I object to what he heard as incompetent and hearsay.

The EXAMINER. I think it sufficiently connected to be proper testimony.

Mr. CALDWELL. I think he must state, first, from whom he heard it; second, when he heard it and third, under what circumstances he heard it before he shall be permitted to testify what he heard as it is hearsay and incompetent under all the rules of evidence.

The EXAMINER. The witness can state where he heard it and from whom he heard it.

The WITNESS. I can't recall where I heard it or when or from whom.

Mr. SMITH. I want that voluntary statement by the witness stricken out physically.

The EXAMINER. I will permit it to stay on the record.

By Mr. SMITH:

Q. Do you know whether Mr. Kane, the investigator, investigated Mr. Charles Seider, of Fourth and Race Streets, Philadelphia? Do you know whether Mr. Kane, the investigator of

the association, investigated the report that Charles Seider, of Fourth and Race Streets, was selling at a price better than the price agreed upon by the association?

A. I don't; Mr. Kane never reported to me on any basis.

Q. Did you ever hear from any member of your association that Mr. Seider had been investigated because of that charge?

Mr. CALDWELL. Objected to as hearsay and not binding on the Lorillard Company.

Mr. WALSH. I object on the part of the American Tobacco Company.

(Objection overruled.

Exceptions.)

A. No; I never heard any member say that.

Q. In the tobacco distributing business in Philadelphia has there been a branch of distributors who have been called subjobbers?

A. There are a lot of so-called subjobbers in Philadelphia. At one time it was said half the retailers in town claimed to be subjobbers but we never had any way of identifying them.

Q. What function did the subjobber serve?

A. I think his business was usually 90% retail. Probably he sold a little stuff wholesale but 90% of it was retail.

104 Q. Usually you think he did some wholesaling and some retailing?

A. Yes, sir.

Q. Were there any of those firms, or men, who do no retailing at all?

A. I can't recall any that didn't do any retailing at all.

Q. Are there any that do more wholesaling than they do retailing?

A. I could not answer that question. I don't know. I don't know how much business they do, or in fact we didn't have a great deal of dealings with subjobbers—that is, my firm.

Q. Where did the subjobbers prior to the agreement made by your association December 6, 1920, buy his products—from the manufacturer or from the wholesalers?

A. At all times from the wholesalers, I suppose.

Q. And in that respect he differed from what you called the old line wholesaler but bought direct from the manufacturer?

A. The subjobber in my estimation is one who buys second-hand—buys through a jobber.

Q. Is the jobber in your opinion and in the trade, distinguished from the wholesaler in that the wholesaler buys from the manufacturer and the subjobber buys from the wholesaler?

A. I think that covers it; yes.

Q. Before your association passed this resolution on December 6, 1920, what difference was there in the discounts given by the wholesalers in Philadelphia, members of your association, to retailers and to subjobbers? Did either the one class or the other get a better discount from the wholesaler?

105 A. I really don't know what scale of discounts jobbers made and gave.

Q. You did know, and you do know now, before December 6, 1920, the sub-jobber got a better discount than the retailer did?

A. No; I would say some of the larger retailers.

Q. I meant to exclude the large retailer and general store. Who got the better discount from the wholesaler, the sub-jobber?

A. I don't know, but I imagine the sub-jobber would because he would buy in larger quantity.

Q. As a matter of fact the sub-jobber did get better discount than the retailer?

A. I don't know.

Q. Have you ever heard that said at any time in the association?

A. I heard it from different places; from members of the association and by sub-jobbers, too.

Q. You have heard it from members of the association?

A. That sub-jobbers got better discount prior to the organization than after.

Q. And than retailers got?

A. That some retailers got.

Q. Did you hear that discussed also at meetings in the association?

A. I imagine that was brought up at times; yes.

Q. You say you imagine it was brought up. As a matter of fact it was discussed, wasn't it?

A. I would say so. I don't pretend to remember everything that was said and done at the meetings covering two years.

Q. After or upon the passage of the resolution of December 6, 1920, by which the association members agreed upon the maximum discount of 8%, to whom did that maximum discount
106 apply?

A. I don't know that; all jobbers were given an 8% discount; the discounts varied I suppose; it applied to the larger trade.

Q. It applied to the larger trade?

A. I would imagine so. If we were selling that merchandise the largest trade would get the largest discount.

Q. I am not asking you what would have happened. What did happen?

A. I don't know what discounts they made.

Q. But as to the maximum discount of 8%, to whom did the maximum discount apply?

A. I have no means of knowing what discount Mr. Cunningham or Mr. Krull gave. It is only fair to assume the larger dealer would get the larger discount.

Q. Was there any difference between the application of the discount to the sub-jobber and the retailer?

A. That was up to the individual jobber as to what discounts he would give and where he applied them.

Q. But nobody was to get a greater discount than 8% whether he was a sub-jobber or a retailer. Is that correct?

A. That was the understanding.

Q. So that the retailer could buy from the wholesaler—68 whole-sale members of your organization—at the same discount as the sub-jobber could buy?

(Objected to by Mr. Walsh as calling for a conclusion.)

107 Mr. TAULANE. I also object.

(Objections overruled. Exceptions allowed.)

A. I presume so—large retailer.

Q. That was the spirit of the resolution, wasn't it?

(Objected to by Mr. Taulane. What has the spirit of the resolu-tion got to do with it? It is what it says.)

(Objection overruled.

Exception.)

A. The understanding was 4% was to be added for overhead.

Q. You have three times made that statement on this record. Will you answer that question?

A. What was the question?

Q. That was the spirit of the resolution, was it not?

Mr. CALDWELL. I object as to what was the spirit of the resolution; it is incompetent and unnecessarily encumbering the record.

(Objection overruled.

Exception.)

A. I don't know whether the wholesalers gave the sub-jobber a better discount or a less discount than larger dealers. The agreement, as far as the agreement was concerned it was so
108 much cost plus so much overhead and he could sell 6 off or 5 off.

Q. But not more than 8%?

A. No; because if they did they thought that would be under cost.

Q. What happened to the sub-jobbers' business in Philadelphia after the wholesalers had agreed upon a maximum discount of 8%?

Mr. TAULANE. That is objected to.

(Objection overruled.

Exception.)

A. I don't think any of them went out of business; most all of them seem to be doing business to-day, as far as I know.

Q. They made a complaint to your association and a petition for a better discount, did they not?

Mr. WALSH. Let the witness testify what happened and not counsel.

A. Yes; I think there was a complaint made.

Q. Do you know that the sub-jobbers perfected an organization to treat with the tobacco wholesalers of Philadelphia, represented by this association of which you were secretary, so that the sub-jobbers might get better discounts?

A. I had heard of such; yes.

Q. Where did you hear that? From whom?

A. I believe it was mentioned at one of the meetings. I think I heard it on the street, too, some time.

100 Q. Did you ever hear of a communication by the sub-jobbers association to your association, dated April 2nd, 1921?

A. I don't recall the date, but I recall there was a communication from them at one time.

Q. You have been asked and subpoenaed to produce copies of discount rates sent by the Wholesale Tobacco Dealers' Association to its members?

A. I don't have any copies of any such notices. All the papers that I have or all the correspondence I have record of going out of my office or under my supervision as secretary of the association are there [indicating].

Q. Did you have any correspondence as secretary of your association with the Lorillard Tobacco Company and the American Tobacco Company?

A. Never.

Q. And you said, I think, in your examination this morning that there were no written reports by the executive committee?

A. None that I ever recall.

Q. And no written reports by the board of directors?

A. I don't recall any; no.

Q. Have you with you any reports made to the association or its secretary or its president or executive committee regarding the selling policy of any wholesalers who were members of your association?

A. No; I have no report.

Q. Were ever such reports made?

A. None in writing; no.

Q. How were the reports made to the association?

A. All I knew of were in a verbal way.

110 Q. Who made the reports?

A. The various jobbers complained, as I testified a while ago, as to Murphy Brothers, in Camden; and Blumenthal and one or two others.

Cross-examination by Mr. TAULANE:

Q. Mr. Brogan, the Wholesale Tobacco and Cigar Dealers' Association—is that incorporated or an unincorporated association?

A. Unincorporated.

Q. When did you say it was dissolved?

A. Formally dissolved at the meeting in June, 1922.

Q. When did it cease its activities?

A. In January or even prior to January of this year.

Q. I notice the last meeting, as appears by the minutes, was January 6th?

A. Yes; that was the last meeting—the last formal meeting and it was poorly attended. There were none held between January and June of this year.

Q. Did the association disintegrate?

A. Yes; January of this year.

Q. It did nothing in the line of its purposes after January?

A. No, sir; it did not.

Q. Mr. Brogan, about the discount of 8% that has been suggested here and 7½% and 7%, were they fixed discounts so as to make the price fixed to all retailers who purchased from the jobbers; or were they simply maximum discounts?

A. My understanding was they were maximum discounts.

Q. Was that agreed to by everybody or simply recommended to the members of the association?

111 Mr. SMITH. That is objected to because the resolution speaks for itself and shows the agreement.

A. It was recommended by the executive committee.

Q. Did the members of the association have a choice or freedom, notwithstanding this agreement as to its recommendation to make any similar discount to its customers?

A. The thing was pliable. They could make any discount they wanted.

Q. The only thing fixed about it was the 8% at one time and 7½% at another time, as the maximum discount recommended by the association?

A. Yes, sir.

Q. And a member had a perfect right to sell his goods at 2% or 4% or 5%?

A. That is what I understood they did.

Q. Was there any penalty attached to a member who gave a larger discount than 8%?

A. None whatever.

Q. By the way, what discount did the jobbers get on these goods?

A. As far as I know, 10 and 2.

Q. And what was the purpose of fixing this maximum discount of 8%?

A. After taking comparison of the overheads of various companies it was thought an average of 4% would something like cover the overhead and taking the maximum of 8%—

Q. Taking a maximum of 8% left little or no profit for the jobber?

A. That was the breaking point.

112 Q. And if more than 8% was allowed to the retailer by the jobber, it was practically selling below cost?

A. Yes.

Q. And the basis was the manufacturer's list price?

A. Yes.

Q. And they allowed 10% and 2% for cash?

A. Yes.

Q. And then all the jobber made on it was the difference between 10% allowed by the manufacturer and the discount allowed the retailer?

A. That's all.

Q. And the purpose of fixing this maximum discount was to prevent the sale of these goods at less than cost?

A. Yes, that's the reason.

Q. And that was simply a recommendation of your association to its members?

A. It was.

Q. Did your association when it started or any time during its existence, include all the jobbers or wholesalers in Philadelphia?

A. I believe it included all with the exception of two that I know of.

Q. And then as it went along some of them dropped out, did they not?

A. Yes; some dropped out.

Q. Do you know what caused the disruption or falling apart of this association, which resulted in its disbandment in January, 1922?

A. I believe the principal reason was the discounts some were giving; some were giving 10 and 9 and some 10 and 1.

Q. They paid no attention to the recommendation?

A. No; I don't think they ever carried it out at any time.

Q. You think they all violated it?

A. Yes.

113 Q. And the members took no interest?

A. No; the attendance was very poor during the last year of the association. They seemed to lack interest.

(No questions by Mr. Caldwell or Mr. Walsh.)

Redirect examination by Mr. SMITH:

Q. Who were the two jobbers?

A. Frings Brothers Company and the other I had in mind was Charles Seider. I think he is on the direct list of the big companies.

Q. Frings Brothers Company—is that a distributing or a manufacturing company?

A. A. They are distributors of tobacco products and I believe are manufacturers of some cigars.

Q. You classify that company as a wholesale house?

A. Yes, sir.

Q. How long have they been in business in Philadelphia?

A. I don't know. A great many years; perhaps before my time.

Q. Charles Seider you say is also a wholesaler?

A. I believe he is.

Q. Was there any endeavor made to get Frings Brothers Co. into your association?

A. I don't know that there was any particular endeavor. They were invited to become members like all others.

Q. The company was invited to join?

A. Yes, sir; I believe so.

114 Q. And they declined to join?

A. They didn't join.

Q. Was Charles Seider asked to join?

A. Yes.

Q. Do you know who asked Charles Seider to join?

A. I wrote him a letter.

Q. Did he ever join?

A. No.

Q. He never became a member?

A. No.

Q. How long in your opinion does the average tobacco wholesaler in Philadelphia take to turn over his stock?

A. How often does he turn over his stock in a certain period?

Q. Yes.

A. I would imagine the margin of profit or the lack of margin of profit would require him to turn it pretty fast.

Q. You don't know how fast that is?

A. No; but I imagine they have to keep turning it pretty lively.

Q. Don't you know they do turn it pretty lively?

A. It is necessary that they turn it lively.

Q. You said on your cross-examination that there were some members of the organization who didn't live up to the agreement on maximum discounts. Who were those members of the association that did not live up to the agreement?

A. I mentioned previously Murphy Brothers, Blumenthal and Victor Fermani and possibly some others.

Q. What happened to Murphy Brothers after they didn't live up to their agreement?

A. I don't know that anything happened to them particularly.

115 Q. They were cut off from the American Tobacco Company, were they not?

A. Not to my knowledge.

Q. You never heard that Murphy Brothers were cut off?

A. I have heard of such things, but don't know it.

Q. Have you heard anybody else was cut off after violating the agreement?

Objected to by Mr. TAULANE.

Mr. PARKER. I submit it isn't right and it isn't fair and it isn't relevant and proper testimony, to try to connect the American Tobacco Company with that transaction by hearsay testimony. Mr. Murphy is here; there is a representative of the American Tobacco Company here.

Mr. SMITH. That is not hearsay.

The EXAMINER. When the gentleman gets through with the witness in his examination in chief, I suggest you gentlemen bring that question out and inquire further into it and I will let him proceed with his examination.

Mr. PARKER. Then I submit counsel should be required to bring it home to his knowledge as secretary of an association and not be per-

mitted to fill this record with pure hearsay testimony. He should state the time and place he heard it and from whom he heard it, so that the examiner can determine whether it came to him in an official capacity or not.

116 The EXAMINER. Tell when you heard it and where you heard it and who told you.

The WITNESS. It is a matter of hearsay. I don't recall the date or when it was. There was never any communication came to me they had been cut off or would be, or hadn't been. I can't say where I heard it or when or who told me.

By Mr. SMITH:

Q. I will repeat the question. Have you heard anybody else was cut off after violating the agreement?

A. I can't name anyone. I may have heard a half dozen say the same thing. In fact, as Mr. Parker mentioned, I don't know that Mr. Cowie didn't mention such a thing. I even heard this morning that Murphy said this; that they were not cut off by reason of any complaint.

Mr. SMITH. Is there any other speech you want to make? Are you satisfied you have said everything you wanted to say?

A. I am if you are.

Q. Is there anybody besides Murphy Brothers that you heard from members of your association had been cut off of the direct list of tobacco manufacturers?

(Objected to on the same grounds as heretofore stated, as 117 hearsay, and incompetent and that the witness must first state the time and place and the occasion.)

Mr. TAULANE. I object for the further reason that it might have been cut off for other reasons.

Mr. SMITH. This complaint alleges a conspiracy.

The EXAMINER. Gentlemen, you know the rules in regard to hearsay evidence are getting very liberal. I think I will let the witness answer this question. It is confined to what he heard from members of the association.

A. I heard of Victor Fermani being cut off at one time.

Mr. WALSH. As I understand the question, the witness is required to state whether he ever heard from any members of the association as to whether any of them has been cut off?

The EXAMINER. No; that is not the question.

Mr. SMITH. The question is, "Did you learn from any member of your association that anybody other than Murphy Brothers were cut off from the direct list of the tobacco manufacturers?"

Objected to by Mr. Caldwell.

Objection overruled. Exception.

118 A. I have heard of Victor Fermani being cut off the list at some time.

Q. Have you heard from the members or any member of your association of any person or firm other than Murphy Brothers and

Victor Fermani having been cut off the direct list of tobacco manufacturers?

(Objected to by Mr. Caldwell on the ground that you first have to prove the person cut off was on the direct list of the manufacturers and there is no proof of that yet and on the ground further that this testimony is absolutely hearsay, is incompetent, and not binding on the respondent, the Lorillard Company.)

Mr. Watson. In which objection the American Tobacco Company joins.

(Objections overruled.)

(Exceptions.)

By Mr. Swann:

Q. Is it not a fact that Blumenthal was cut off from the direct list of tobacco manufacturers or tobacco manufacturing companies—

A. What is that?

Q. Is it not a fact that Blumenthal was cut off from the direct list of a tobacco manufacturing company or tobacco manufacturing companies, according to the reports made to you as heard by you after Mr. Kane had investigated reports that M. Blumenthal was selling at better than the discounts agreed upon by the association?

119 Mr. Watson. The same objection.

Mr. Caldwell. Same objection. It calls for a conclusion and not a fact.

(Objections overruled.)

(Exceptions.)

A. I can't recall having heard or known as a fact that Blumenthal was ever cut off.

Q. I thought you said previously that you had heard from some member of your association that Blumenthal had been cut off. Did I misunderstand you?

A. As I recall it that he had been investigated, on complaint made.

Q. Do I understand you to say on your previous examination that Murphy Brothers of Camden had been cut off some direct list of some manufacturer or manufacturers of tobacco? That you heard that from some member of your association?

A. Yes.

Q. It is not a fact that information came to you after Murphy Brothers had been investigated on a complaint that they were not living up to the agreement of the association regarding the making of the maximum discount?

Mr. Caldwell. I make the same objection on behalf of the Lorillard Company to all of this testimony.

(Objection overruled.)

(Exception.)

A. I don't recall the date.

Q. I didn't ask you, sir, for the date.

A. I can't recall whether it was given or after the investigation you mention.

Q. Did I understand you to say on your examination that V. Fournier, according to the information you had gotten from our member or members of your association, had been cut off from the direct list of tobacco manufacturers?

A. Subjected to by Mr. Caldwell on the same ground subjected to by Mr. Walsh on the same ground, on behalf of the American Tobacco Company.

Q. (Addressing the witness.)

A. I have heard that.

Q. Did you get this information from a member or members of our association before or after V. Fournier was investigated upon the charge or complaint that he was giving better than the list cut off by the association?

A. I cannot. Some objection.

Q. (Addressing the witness.)

A. I do not remember.

Q. By the way, had you visited and seen your witness after Mr. Foster claimed you didn't remember?

A. Yes.

Q. Mr. Fournier, I am not attending to the objection as to that the witness. I was attending to stop off Mr. Caldwell in his deposition because I understood he was there and I don't remember.

Q. I do not think any witness ought to be investigated.

A. Yes. It is just a matter of fact and of suggesting matters.

Q. Mr. Fournier, did I mention you in attending the question, Mr. Fournier?

A. The witness. You did not, sir.

Q. Mr. Fournier, did you understand I mentioned to you?

A. The witness. No. I had my notes ready and I had a copy there as before you spoke.

Q. By Mr. Spence:

Q. Did you ever hear when you were members of the association, one or representatives of any tobacco manufacturing company or any member of your association, that Charles Smith had been cut off from the direct list of one or more tobacco manufacturers?

A. I cannot. Subjected to as mentioned and on the further ground we have been all over this and the direct commission we need and our commission. I don't get the witness commission. I don't get the witness. I don't get the witness. I don't get the witness.

Q. The witness. I don't get the witness.

A. No.

Q. The witness. Yes further questions questions?

A. The witness. Yes I got the witness a witness. I don't get the witness. I don't get the witness. I don't get the witness.

examiner has permitted to go in, so that my objection is on the record both ways?

The EXAMINER. We will note the objection of Mr. Caldwell.

Mr. WALSH. That is all so far as the American Tobacco Company is concerned.

Mr. CALDWELL. There is some testimony, Mr. Examiner, you said you would strike out unless it was connected up, and I move that it be stricken out.

The EXAMINER. We will not strike it out now; it is time to adjourn. We will adjourn until to-morrow morning at 10 o'clock.

Adjourned until to-morrow morning, Tuesday, October 17, 1922,

10 a. m., in this room, 318 Federal Building, Philadelphia, Pa.

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BEFORE THE FEDERAL TRADE COMMISSION

FEDERAL TRADE COMMISSION

VS.

WHOLESALE CIGAR AND TOBACCO DEALERS ASSOCIATION OF PHILADELPHIA, et al.

Docket No. 886

PHILADELPHIA, October 17, 1922.

Met pursuant to adjournment, 10.00 a. m.

Before George McCorkle, examiner.

Appearances: Edward L. Smith and Edwin B. Hass, attorneys for commission; John Walsh for the American Tobacco Co., of respondents; Charles Caldwell for the Lorillard Company, of respondents; Joseph H. Taulane for respondents.

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Docket 886

EXAMINER McCORKLE. Are you ready, gentlemen?

Mr. SMITH. Yes, sir; we are ready to proceed if your honor please.

PAUL L. BROGAN resumed the stand and testified as follows:

Mr. SMITH. Mr. Examiner, there is one line of questioning I want to go into with Mr. Brogan that I omitted yesterday as a matter covered on his cross-examination. I want to ask a few questions along that line.

Redirect examination by Mr. SMITH:

Q. Mr. Brogan, did your company live up to the resolution adopted by the Philadelphia Wholesale Tobacco Jobbers' Association fixing the maximum discount at 8%?

A. You understand our firm doesn't deal in cigarettes or tobacco. The discounts which you refer to, of course, were only on cigarettes and tobaccos and didn't apply to cigars.

Q. What was the maximum discount allowed by your company after the association fixed the maximum discount at 8%?

125 Mr. TAULANE. That is objected to because the evidence and the resolution shows that this discount only applied to cigarettes and tobacco and he doesn't deal in any of those things.

The EXAMINER. Let him answer.

A. It didn't relate to cigars at all. The line of cigars we handle are not handled by other jobbers here; if they are they would be in a subjobbing way and we would have our own schedule of discounts and, so far as this association was concerned, it had no bearing on our line at all.

Q. You say your line is an exclusive agency?

A. I mean we are—that is, we have an exclusive agency in the lines of cigars we sell.

Q. Who makes the cigars you sell?

A. Various manufacturers.

Q. Does the American Tobacco Company make any of them?

A. We buy some cigars from the American Cigar Company.

Q. What percentage of the goods handled by your company are purchased by your company from the American Cigar Company?

A. A very small percentage.

Q. What is the percentage?

A. I don't have the figures available.

Q. Who are the manufacturers of the other exclusive lines which you handle?

A. Wood & Bond Company, Newark, N. J., Webster Cigar Co., Detroit, Spiess Cigar Co., Detroit, Roy Sworaz Company, New York City, A. Centielli & Co., Tampa, Fla.

Q. Pardon me, are you speaking of the present time?

A. I am; yes, sir.

Q. In 1920 what percentage of the cigars handled by your company were purchased from the American Tobacco Co.?

A. I would say around 30 per cent.

Q. Did your business undergo a change in the early part of 1922?

A. It did.

Q. What was that change?

A. It became independent in one respect, you might say. Myself and several others interested in our business purchased the interest of the American Cigar Company. The transfer took place December 11, last.

Q. What was the interest the American Cigar Company had in your firm up until the time you and your associates purchased that interest?

A. They held practically all of the stock.

Q. The American Cigar Company is a subsidiary company, is it not, of the American Tobacco Company?

A. I believe it is.

Q. You believe it is?

A. Yes.

By Mr. TAULANE:

Q. Do you know of your own knowledge whether it is a subsidiary company or not?

A. Nothing more than I heard.

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By Mr. SMITH:

Q. Where did you get your information?

A. It is commonly understood.

Mr. WALSH. I object to that. If we are going to proceed here today in a legal way, we ought to present to get down to it. Could says to the witness where did you get your information and he says, "It is common knowledge." Let him ask him what he knows; if the American Cigar Company is a subsidiary of the American Tobacco Company I don't know and I never heard of it.

Mr. SMITH. That is strange, because the entire world knows that.

The EXAMINER. I will let him state what he knows.

A. As a matter of fact, of direct knowledge, I don't know whether the American Tobacco Company owns one dollar's worth of the stock of the American Cigar Company. I could not swear whether the American Cigar Company does.

Q. Where did you get the information on which to base the statement that the American Tobacco Company controlled the American Cigar Company?

A. Nowhere in particular; everywhere.

Q. Did you ever hear it from any of the officers or officials
128 of the American Cigar Company?

A. I can't say that I ever did have them tell me that.

Q. Or from anyone connected with the American Tobacco Co.?

A. I don't know any of the officials of the American Tobacco Company.

Q. Did you ever hear it from any of the representatives of the American Tobacco Company, although they might not be officials of the Company?

A. I can't say that I have.

Q. I asked you what was the highest discount your company allowed on the products it handled, immediately upon the adoption by the association of the resolution fixing the maximum discount at 8% on the products named in the resolution.

(Objected to.)

A. This resolution you refer to had absolutely no bearing whatever on our discounts. They remained the same as they were prior to it if there was any change it had nothing to do with it.

Q. I asked you what was your discount immediately upon the passage of this resolution fixing the discount on the things mentioned in the resolution at 8%.

A. Discounts on our lines of cigars? They are dependent on quantity possibly on the customer and if they were 5%, we will say 5 on \$2,500, less 5%, first off list price. Other quantities possibly only 2%.

Q. Again I will ask you what was the maximum discount allowed by your company immediately upon the adoption of the resolution by the association fixing the maximum discount on the products named in the resolution at 8%.

A. Our maximum discount at any time was 5 and 2%.

Q. Was there any change in the discount allowed by your company at or about the time the resolution was adopted, changing the discount from 5 to 8%.

A. No change whatever.

Q. Your discount was five and two at all times?

A. No, not all times. I would not say that. We change our discount at times.

Q. What was the highest discount from list price you allowed in the period from October, 1920, to the end of 1921?

A. It would be impossible for me to say, unless I went over every invoice we billed during the time.

Q. Was it higher than 6%.

A. Five and two was our best discount. That was a set rule on the largest quantities.

Q. That was in the period from October, 1920, to the latter part of 1921?

A. Yes, it has always been that way.

By Mr. TAULANE:

Q. Mr. Brogan, you are here pursuant to a subpoena by the commission?

A. Yes, sir.

Q. You were subpoenaed by the Federal Trade Commission to appear and testify?

A. I was.

ISSAC LAKOFF was thereupon called as a witness, and having been duly sworn, testified as follows:

Direct examination by Mr. SMITH:

Q. What is your business, Mr. Lakoff?

A. Candy and cigars and cigarettes.

Q. Where is your place of business?

A. 322 Market Street.

Q. Philadelphia?

A. Yes, sir.

Q. Is your business a retail business or a wholesale business?

A. Wholesale.

Q. Are you the sole owner of the business or is there some other person who owns the business with you?

A. Me and my brother.

Q. What is your brother's name?

A. H. M. Lakoff.

Q. Are you on the direct list of any tobacco manufacturer?

A. With some we buy direct.

Q. From whom are you buying direct?

A. I could not give you much information because my brother always takes care of that.

Q. Can you tell us whether you are on the direct list of the American Tobacco Company?

A. I am sure we are not on the direct list there.

Q. Are you on the direct list of the Lorillard Company?

A. I don't think so.

Q. You don't think so?

A. No; I know we are getting from a couple small manufacturers.

Q. Are you getting from the large manufacturers?

A. No.

131 Q. Do you know the Bayonne Tobacco Company, of Bayonne, N. J.?

A. Yes, sir.

Q. What business are they in?

A. Wholesale tobacco.

Q. Did your firm ever have any business dealings with the Bayonne Tobacco Co.?

A. Yes, sir.

Q. What were those dealings?

A. We had some securities and the like.

Q. You bought from the Bayonne Tobacco Co.?

A. Yes, sir.

Q. Do you remember receiving a shipment from the Bayonne Tobacco Co. in September, 1921?

A. I do.

Q. Did you yourself see the shipment delivered in your place of business?

A. I did.

Q. Do you remember any particular date in September, 1921, when the shipment was received by your firm from the Bayonne Tobacco Co.?

A. I do.

Q. What was the date?

A. Monday, September 19th.

Q. 1921?

A. 1921.

Q. Where were you at that time?

A. In the store; in the front of the store. I just happened to come outside and I saw a young man looking and reading the name on the carton and another young man six or eight feet from me and as soon as they saw me they disappeared. I didn't have a good chance to look at them.

Q. Where were the cartons when you saw them?

A. In the back of the wagon.

132 Q. You said you saw the man looking in; what did you mean?

A. Looking in reading the name; it looked like the men had that purpose and when they saw me they looked surprised and got away.

Q. You said the men were looking in. What do you mean?

A. Looking in the wagon. Looking in the back of it.

Q. In the back of the wagon? Looking in the back?

A. Yes, sir.

Q. What was on the carton?

A. Where the cigarettes came from.

Q. And I think you said the cigarettes came from the Bayonne Tobacco Company?

A. Yes, sir.

Q. Up to the time, September, 1921, had you been buying regularly from the Bayonne Tobacco Co.?

A. Yes, sir.

Q. After this incident which you described as having taken place on this day in September, 1921, did your firm endeavor to buy more goods from the Bayonne Tobacco Company?

A. Yes, sir.

Q. Did the Bayonne Tobacco Company sell you?

A. No, sir.

Q. Do you know why not?

A. I do, yes; because they could not get it.

Q. Who was the manufacturer of the cigarettes received by your firm on this occasion in September, 1921, when you saw these two men looking at the cartons? What brand of cigarettes were they?

A. That I don't know. Camel cigarettes, I am sure it was.

133 Q. Who makes the Camel cigarette?

A. Liggett & Myers, I guess. I am not much acquainted with this business. My brother is the man who runs that.

Mr. WALSH. I move to strike the "guess" out.

The EXAMINER. Strike out what the witness guesses.

The WITNESS. All the business is done by my brother.

Q. You want us to know you don't know the name of the manufacturer of the cigarettes?

A. No, I don't know. I am not acquainted with that.

Mr. CALDWELL. May it please the court I would like permission to strike out this testimony in which he says the Bayonne Tobacco Company should not get these cigarettes.

Mr. WALSH. I join in that request.

Mr. SMITH. I think that might be stricken out if it is not connected, but I will ask that this motion be withheld at this time until I have an opportunity to connect the Bayonne Tobacco Company with this transaction and this manufacturer and then if I do not do so, I am perfectly willing that that testimony of this witness in that respect shall be stricken out.

134 Mr. WALSH. If your honor please, I don't think the record should be run in that manner.

The EXAMINEE. If Mr. Smith doesn't connect this up in a competent way, I will accede to your motion to strike it out.

Cross-examination by Mr. CALDWELL:

Q. Mr. Lakoff, what is the name of your firm?

A. Lakoff Brothers.

Q. Did your firm fail in business?

A. Not since I am in business.

Q. How long have you been in it?

A. Two years.

Q. Before that, what was the name of the business?

A. H. M. Lakoff.

Q. Did he fail?

A. Yes, sir.

Q. In the tobacco business?

A. Candy and tobacco business.

Q. What kind of tobacco business are you in? What do you deal in? Do you deal in cigars, cigarettes, smoking tobacco and chewing tobacco?

A. Yes, sir.

Q. Whereabouts is your place of business?

A. 322 Market Street.

Q. Philadelphia?

A. Yes, sir.

Cross-examination by Mr. TAULANE:

Q. You are in the real estate business, aren't you?

A. No, sir.

135 Q. Were you in the real estate business?

A. No, sir.

Q. When did your brother fail?

A. Oh, about three years—two years—I am in business two years.

Q. Did you go through bankruptcy?

A. I?

Q. Your brother?

A. Yes, sir.

Q. You went in business with him after that?

A. Yes, sir.

Q. You don't know anything about the tobacco business yourself?

A. Not as much as he does.

Q. What was your business before you went into the tobacco business?

A. Furniture business.

By Mr. CALDWELL:

Q. Your firm was never a direct buyer from the Lorillard Company at any time?

A. I could not give you any information; I don't know.

Q. You don't know with whom you dealt? You don't know that they ever were on the direct list of the Lorillard Co.?

A. I don't know a thing about it. I never went into that business much before.

Q. What is your business?

A. Candy, cigarettes, cigars, and so on.

Q. And you don't know a thing about who your firm has bought tobacco from?

A. You asked me that question previous to I was in business; I know it now.

136 JOHN W. KANE was thereupon called as a witness, and having been duly sworn, testified as follows:

Direct examination by Mr. SMITH:

Q. Mr. Kane, where do you live?

A. 805 Sanger Street, Philadelphia.

Q. What is your business at the present time?

A. Salesman.

Q. What do you sell?

A. Cigars.

Q. For whom?

A. H. B. Yost, Hanover, Pa.

Q. How long have you been salesman for the Yost Company?

A. About two years.

Q. During all of these two years has that been your sole occupation—salesman for the Yost cigar people?

A. I have been doing other work along with that.

Q. During these two years what other work have you been doing?

A. I am doing accounting work—at that time I was doing some investigation work for the Tobacco Jobbers' Association.

Q. When did you commence doing work for the Tobacco Jobbers' Association, one of the respondents in this proceeding?

A. About a year and a half ago.

Q. Do you remember the date when you commenced your work as investigator?

A. No; I could not give you the date.

Q. Do you remember the month?

A. No; I don't know the month.

137 Q. When you began your duties as investigator for the association, were you then employed by the Yost Company as a cigar salesman?

A. I think I was at that time.

Q. Have you been connected with Dusel Goodloe & Company, wholesale cigar dealers of Philadelphia?

A. Yes.

Q. What was your connection with that firm?

A. I was secretary there.

Q. When were you secretary of that firm?

A. Well, I guess about 1915.

Q. Were you connected with the firm in any way after 1915?

A. Yes, I was there from 1915 to about the last of 1920.

Q. And during the period from 1915 to the latter part of 1920, when you were connected with Dusel Goodloe & Company, what was your connection with that company?

A. I was secretary.

Q. So that you were secretary of the Dusel Goodloe & Co. up until the latter part of 1920?

A. Yes, sir.

Q. Do you remember the date when your connection with the Dusel Goodloe Company terminated?

A. I think it was December 31, 1920.

Q. Was it before or after you terminated your connection with the Dusel Goodloe Company you became investigator for the association?

A. It was after I left Dusel Goodloe & Company.

Q. How long after you left Dusel Goodloe & Co.?

A. I guess about six months, I think.

138 Q. Who were the persons who employed you as investigator of the association?

A. Why, Mr. Herman Krull, Mr. Nelson Ebertach, and Mr. Brogan was there at the time, at the first meeting.

Q. Who first opened the negotiations regarding your employment as investigator for the association, you or some member of the association?

A. I think they spoke to me about it first.

Q. Who was it first spoke to you?

A. I could not say for sure who it was.

Q. Mr. Kane, in the period between the severing of your connection with Dusel Goodloe & Company and your employment as investigator for the association, what did you do? What was your business in that period?

A. I was selling cigars.

Q. For whom?

A. I think it was H. P. Yost, of Hanover, and Nathan Garten, of New York.

Q. Where was this subject of your employment as investigator first discussed? Where was the first interview had? Where was the first interview had by you with any member of the association regarding that subject?

A. I think it was at the Bourse Building, in the dining room up on the 7th floor.

Q. Were all those three gentlemen there on the first occasion?

A. Yes, sir.

Q. What was said to you by these men on that occasion in the Bourse Building?

A. Why, I was to report any irregularities in prices.

139 Q. Did they say what irregularities in price would be that you were to report?

A. No.

Q. Did you get any understanding from what these gentlemen said to you, what your duties were?

A. That is about all—I was to report these irregularities in prices and trace out who was selling some of these retailers in town.

Q. Did they tell you what an irregularity in price was or would be?

A. No, they didn't tell me that.

Q. Did you know that these gentlemen were members of this association?

A. I knew about the association; yes.

Q. Where did you get the knowledge that these gentlemen were members of the association?

A. I attended the first meeting of the association.

Q. Do you remember when that was?

A. No.

Q. At that time you were connected with the Dusel-Goodloe & Company, as I understand it?

A. Yes, sir.

Q. So that you learned at that meeting the purpose of the organization, is that right?

A. Yes, sir.

Q. Did you ever attend any meetings other than the first meeting of the association?

A. I don't think I did.

Q. What salary was agreed to be paid you by the association for your work as investigator?

A. \$40 a week.

Q. How long did you work as investigator for the association?

A. I don't know exactly, but I think it was about two months.

140 Q. And were you paid the salary these gentlemen agreed you should be paid?

A. Yes.

Q. How was the money paid; by check or in cash?

A. By cash.

Q. Who paid it to you?

A. I think it was Mr. Herman Krull most of the time—I think he gave it to me every time.

Q. Where did you collect your wages?

A. At Mr. Krull's place of business.

Q. During the period when you were investigator for the association did you know the maximum discount agreed upon by the members of the association?

Mr. CALDWELL. That is objected to, as it calls for a conclusion. It calls for a conclusion that there was a maximum amount of discount agreed upon.

(Objection overruled.)

Exception.)

A. Well, I understand there was a certain amount of discount agreed upon; yes.

Q. Where did you get your understanding, Mr. Kane?

A. Well, I had nothing in writing or any facts in the case.

Q. Did you get it from some member of the association or some of its officers?

A. I could not say where I got it from.

Q. Did you investigate tobacco dealers in Philadelphia during this period that you worked as investigator for the association?

141 A. Well, I was travelling around as a cigar salesman and any differences in prices I would try to trace it out and see who they were getting the goods from.

Q. What were the names of the dealers you investigated for the purpose of finding out the name of the manufacturer, or dealer?

A. It was for the purpose of finding out the name of the jobber who was selling this particular dealer.

Q. What were the names of the dealers that you investigated for the purpose of finding out what jobber was selling them?

A. One of them was B. Honowitz, 1033 Locust Street.

Q. Did you investigate the source of supply of Honowitz of your own volition or because you had been directed or requested by some of the members of the association to investigate the source of supply of Honowitz?

A. I can't say whether I was directed by the association or not because in my travels around I would hear of this case and knew pretty nearly what was going on.

Q. Were you given the names by Mr. Eberbach or by Mr. Krull?

A. I was given some names; yes.

Q. What were the names that were given you by these gentlemen or either of them to investigate?

A. I think this Honowitz was one of them—B. Honowitz.

Q. Mr. Eberbach or Mr. Krull told you to look up Honowitz and see who was selling to him—who he was buying his goods from?

A. Yes.

142 Q. I think you said you did investigate Honowitz?

A. Yes.

Q. Who did you find Honowitz was buying from?

A. I could not get any definite information on him.

Q. Didn't you find Honowitz was buying from Charles Seider at Fourth and Race Streets?

A. Not definitely; no.

Q. Didn't you report to the association or to Mr. Eberbach or Mr. Krull that Honowitz was buying from Seider?

A. I could not get any definite information about it.

Q. What was your report to the association or to Mr. Eberbach or to Mr. Krull on the investigation you made of Honowitz?

A. I think I reported some members that were on the cases.

Q. What else did you report?

A. That was all.

Q. Did you report the prices that Honowitz was paying for his goods?

A. No; I could not get that information.

Q. Did you try to get that information?

A. No; I didn't try to get that.

Q. Did you investigate the firm of Murphy Brothers of Camden to find out who in Philadelphia they were shipping to?

A. I did that.

Q. Did you obtain the names of the parties in Philadelphia that Murphy Brothers were selling to?

A. I got some names; yes, sir.

Q. What were those names you got?

A. M. Davidson for one. Post Cigar Company for another one.

143 Q. Any other firm in Philadelphia that you found Murphy Brothers were selling to?

A. I can't recall any other names now.

Q. What did you find out in your investigation of Murphy Brothers as to the discounts they were allowing to Davidson?

A. I didn't see any of the bills or get any information at all about prices.

Q. Did you get any information from Davidson himself or anybody in his establishment?

A. No, I didn't go to see Davidson about that. I just wanted to see who he got his goods from.

Q. Did you find out what the Post Cigar Company was buying from Murphy Brothers for—the rate of discount?

A. No.

Q. What did you report to the association regarding Davidson and the Post Cigar Company?

A. I reported that Murphy Brothers had made shipments to those two different firms, that was all.

Q. Were there any other firms that were customers of Murphy Brothers you reported to the association on?

A. Not any more than to find out Murphy Brothers were selling to them and making deliveries to them.

Q. You named M. Davidson and the Post Cigar Company whom you found to be purchasers from the Murphy Brothers?

A. Yes, sir.

Q. Were there any other firms you found in your investigation to be purchasers from Murphy Brothers, that is, in Philadelphia?

A. I can't recall any others just now.

144 Q. You think, however, there may have been some others?

A. There were a couple of others, I think.

Q. Do you remember any other tobacco firms you investigated while you were employed by the association as you have described?

A. I think that was about all.

Q. Now, are there any other firms in Philadelphia whom you investigated for the association besides those you have given us?

A. That was about all I had.

Q. Do you remember investigating Blumenthal of 108 South Street, Philadelphia?

A. I think his name was given to me but I didn't find out who he was selling. I didn't see any of his bills or anything.

Q. But you investigated Blumenthal?

A. I don't think I did anything with that.

Q. His name was given to you?

A. Yes; I think his name was given to me.

Q. Who gave you his name?

A. I could not say for sure. I could not say for sure who it was.

Q. It was some member of the association?

A. I presume so.

Q. Some member of the association.

A. Yes.

Q. Were there any other names given you for investigation by members of the association besides those you have already mentioned?

A. There were several other names, but I can't recall who they were or who gave them to me.

Q. Did you investigate a dealer named Victor Fermari, of 5144 Market Street, Phila.?

145 A. His name was given to me but I didn't make any investigations of it.

Q. In the cases where you did make investigations did you make reports to the association or to somebody in the association?

A. I made reports to some members of the association.

Q. Were those reports in writing or were they oral reports?

A. They were oral reports.

Q. After you investigated Murphy Brothers for the association did you get any information from anybody connected with the association as to the outcome of your investigation?

A. No; I didn't.

Q. Did you get any information from anybody else as to the result of your investigation?

A. No.

Q. Did I understand you to say that during the period you were employed as investigator you also followed other duties?

A. Yes, sir.

Q. What percentage of your time did you give to your duties as investigator?

A. While I was calling on these cigar stores I would get the information. I was getting what information I could for the association while I was calling on these cigar stores.

Q. What were the ways you endeavored to get the information for the association?

A. At that time there had been a lot of talk going amongst these retailers about prices and the information came to me unsolicited.

Q. That, I suppose, was one of the ways you used in investigating dealers. Was there any other ways you used or employed?

146 A. Well, I have asked some of them what prices they were getting.

Q. That is, you asked subjobbers——

A. Retailers.

Q. You asked retailers who they were purchasing their goods from and what discount they were being allowed?

A. That is right.

Q. Did you ever ask for the invoices of retailers from their jobbers?

A. I don't think I ever asked to see an invoice.

Q. Did I understand you to say that you did find from what Honowitz told you that he was buying from Seider?

A. No; all I found in Honowitz was some numbers on the cases.

Q. When you found those numbers on the cases what did you do?

A. I reported it to some of the members of the association.

Q. What did the numbers on the cases mean?

A. They must be the factory numbers.

Q. And do the cases also give the name of the manufacturer?

A. Sometimes the name is crossed off.

Q. But the name always appears on the case, although it may be crossed off?

A. That is right.

Q. And in those reports did you also give the name of the manufacturer as well as the number on the case?

A. Well, I gave the number along with the name of the goods the case contained.

Q. I suppose the name of the goods would indicate to any tobacco man the name of the manufacturer?

A. That is right.

147 Q. With that information would it be possible to trace the name of the jobber?

A. I believe so, yet I don't know for sure.

Q. Well, is it a generally understood fact in the tobacco business that you can trace the name of the jobber from the number on the box and the nature of the contents; that is, as to brand?

Mr. CALDWELL. That is objected to unless the witness knows of his own knowledge.

A. I don't know for sure whether they can or not.

Q. Well, did you feel that when you furnished to the association or to some of its officers the number appearing upon the case and the name of the brand in the case the name of the jobber could be traced?

Mr. CALDWELL. I object. What he felt was immaterial.

(Question withdrawn.)

Q. Why did you in your reports to the association or its officers in some of these cases you have described report only the number appearing on the carton or the box or the case and the name of the article contained in the container?

A. Most of the time the name of the jobber was crossed off who made the shipment.

148 Q. Did you report to the association or to its officers in those cases that the name of the jobber had been crossed off from the container?

A. The name was cut out so you could not read it, and the only thing you had to go by was the number, and I reported the name of the companies.

Q. You said the only thing you had to go by was the number. How could you go by the number?

A. Mostly all these cases are numbered.

Q. What do those numbers mean?

A. I suppose that is the factory number.

MR. CALDWELL. I move to strike out any supposition on the part of the witness.

THE EXAMINER. Let's see what the man knows. Strike out the supposition.

By MR. SMITH:

Q. Do you know what the numbers on the case signify?

A. I don't know what the numbers mean; no.

Q. How did it happen you reported to the association or to its officers among other things the number on the container? Did you do that of your own volition, or was it suggested to you by some one connected with the association that you report the numbers on the containers?

A. I don't think it was ever suggested to me. It was of my own volition, I guess.

Q. In the cases where the jobber's name appears, did you 149 report to the association or to its officers the numbers on the container?

A. Well, where I had the name—where the name could be seen—I reported the name only.

Q. And where the name was obliterated you reported the number?

A. Yes, sir.

Q. What did you find as to shipments of Murphy Brothers—did you find their names appeared on the containers of shipments or was their name obliterated?

A. I happened to be at the stores at the time the deliveries were made by Murphy Brothers.

Q. Was the name Murphy Brothers obliterated from the containers of these products in these cases where you made investigations?

A. I didn't notice that. I didn't notice the cartons at all, only to see the wagon there at the time of unloading goods.

Q. And you saw it was Murphy Brothers wagons?

A. Yes, sir.

Q. And that was sufficient?

A. That was sufficient.

Q. You didn't have to report the number appearing on the cases in that instance?

A. No.

Cross-examination by Mr. CALDWELL:

Q. Mr. Kane, on these cartons are there various numbers?

A. There are various numbers on the cartons.

Q. Do the railroads stamp numbers on the cartons as far as you know?

A. I believe so.

Q. So of your own knowledge you had no means of knowing what the numbers you reported represented?

A. No.

150 Q. All you did, you saw the figures on the cartons and reported the figures?

A. That's it.

By Mr. TAULANE:

Q. They may have been date numbers—could they not have been?

A. Yes.

By Mr. CALDWELL:

Q. You could not tell whether these numbers represented weight, could you?

A. All I did was to report what numbers were on these cartons, that is all. If there were two or more numbers in different places I reported them.

By Mr. WALSH:

Q. Did you have any authority to make any recommendations as to how any tobacco dealer should be dealt with in any way by the association?

A. No.

Redirect examination by Mr. SMITH:

Q. Mr. Kane, do the containers of tobacco products, cigarettes and the like have a serial number marked on them by the manufacturer?

Mr. CALDWELL. I object to that unless this witness knows.

151 The Witness. All I know is they had sometimes two and three different marks on the cases.

Q. How were those marks put on the cases; in crayon pencil or were they printed or stamped there?

A. Most of the time it looked like stencil work.

Q. I presume you know the difference between the number that indicates a manufacturer's serial number and a number which indicates a weight?

A. I took whatever numbers were on the case. That was my duty.

Q. And reported those to the association?

A. That is right.

Q. And you did that as you say, only in the cases where the names of the jobber did not appear.

(Objected to because that has already been answered.)

A. Yes, sir.

(Recess declared for 15 minutes.)

Examiner McCORKLE. Are you ready, gentlemen?

Mr. SMITH. Yes, sir; we are ready to proceed, if your honor please.

152 NELSON F. EBERBACH was thereupon called as a witness, and having been duly sworn testified as follows:

Direct examination by Mr. Smith:

Q. Mr. Eberbach, where do you live?

A. 441 West Stafford Street, Philadelphia.

Q. What is your business?

A. Wholesale dealer in tobacco and cigars.

Q. What firm are you with?

A. A. B. Cunningham & Company.

Q. Is that a corporation?

A. It is not a corporation.

Q. Are you one of the partners?

A. Yes.

Q. How long have you been with the firm as a partner?

A. About 30 years.

Q. What does A. B. Cunningham & Company deal in?

A. Tobacco and cigars and other lines of merchandise pertaining to that business.

Q. When you speak of tobacco and cigars do you mean all the lines of tobacco excepting cigars?

A. By tobacco what do you mean?

Q. Various products made from tobacco—cigarettes?

A. Yes, sir.

Q. Smoking tobacco?

A. Yes, sir.

Q. Chewing tobacco?

A. Yes, sir; all products made from tobacco.

Q. Where does A. B. Cunningham & Company sell its merchandise?

A. Eastern Pennsylvania, New Jersey, southern Jersey, Delaware, and part of Maryland.

153 Q. How do you sell in those places outside of the State of Pennsylvania?

A. How do we sell?

Q. Yes?

A. What do you mean?

Q. Do you have stores in those places or men who travel?

A. Through representatives.

Q. Are those men representatives of the A. B. Cunningham Company?

A. Yes.

Q. And they secure orders in the States of New Jersey and Delaware?

A. Yes.

Q. And transmit the orders for acceptance to Philadelphia?

A. Yes.

Q. When the orders are accepted as to these customers in New Jersey and Delaware, and customers outside of the State of Pennsylvania, where are the goods shipped from?

A. Philadelphia.

Q. What is the relative standing in size of A. B. Cunningham & Company in Philadelphia among the Philadelphia jobbers?

A. I could not answer that. I don't know the volume of our competitors' business at all.

Q. Who in the trade is considered to be the largest wholesaler in Philadelphia?

A. I could not answer that. Some people may have one opinion and others another.

Q. Who in your opinion is the largest?

A. I don't know.

Q. Have you any opinion on the subject?

A. No; I haven't given it any consideration.

Q. Do you have any objection to stating the volume of business of your company and if you do have an objection, say so?

A. Yes.

Q. You do not care to state the volume of business done by your company?

A. No.

124 Q. Where does your company obtain, or from whom does it obtain its tobacco and cigars and tobacco products?

A. Do you want me to enumerate a list?

Q. Yes.

A. I presume there must be at least 50 to 100.

Q. Who are the more important of the manufacturers?

A. Liggett & Myers Tobacco Co., P. Lorillard Company, American Tobacco Company, John J. Baggett Company, Laras Brothers Company, United States Tobacco Company, Pinkerton Tobacco Company. Do you want more, or is that sufficient?

Q. That is sufficient. You do deal in goods of the Lorillard Tobacco Company and the American Tobacco Company?

A. Yes.

Q. Why do you handle the goods of the American Tobacco Co.?

A. Why do we handle them?

Q. Yes.

A. For profit.

Q. Is it because there is a demand for the products of the American Tobacco Company in the retail trade?

A. Yes; one of the reasons.

Q. Do those reasons also apply to your handling of the Lorillard Company's products?

A. Yes.

Q. If you were not able to secure the products of the American Tobacco Company and your competitors were able to secure them, would that situation affect your business in any way?

A. It would be somewhat annoying.

Q. Do you have a large business in the American Tobacco Co. products?

A. No; not as much as some of the other lines.

155 Q. Do you have a large business in the Lorillard Company products?

A. Possibly about the same. About the same proportion.

Q. What is the name of the manufacturer for whom you handle the most products?

A. I could not say that off-hand; I would not know without looking up our records.

Q. Which would you say, without looking up the records?

A. Which would I say, without looking up the records, I deal in most?

Q. Yes.

A. I would say the R. J. Reynolds Company or the Liggett-Myer Company. That is off-hand. That is my opinion without knowing.

Q. What do you say as to the American Tobacco Company? Where would they rank?

A. In Philadelphia?

Q. No; in your business.

A. I would say they would probably run about fourth.

Q. And what would you say about Lorillard in your business?

A. About the same. They would probably in my opinion run the same; I don't know definitely, but I would say they rank about equal.

Q. Your business is to sell to the retail trade, as I understand it. Is that correct?

A. We sell the retail trade. We sell anyone who cares to purchase our merchandise, on whom we can make a profit. It doesn't necessarily have to be a retailer. What name he would travel on would make no difference.

Q. Were you one of the organizers of the Association of Wholesale Tobacco Dealers of Philadelphia?

A. Yes.

156 Q. Who is the moving spirit in the organization of that association?

A. I don't know that there was any one individual that was the moving spirit. It grew out, rather, of a desire for a more fraternal feeling among the trade.

Q. Who would you say were the leaders of the organization?

A. The leaders of the organization? Oh, the principal houses of the trade—those who were mostly interested.

Q. Who were they?

A. They would take in—do you want them enumerated?

Q. Yes, please.

A. E. Cohen & Son, Franklin Tobacco Company, Charles Krull, Murphy Brothers, Camden; E. F. Murphy Company, H. D. Narri-gan, F. Blatt. That's about all I can think of.

Q. Who first suggested to you the organization of the association?

A. I don't recollect that. I don't recall who first suggested it.

Q. Were there any preliminary discussions by you and other tobacco dealers in Philadelphia regarding the formation of the association before it became organized?

A. There may have been; I don't recall any detail relative to that.

Q. Do you recall who discussed with you the idea of forming the organization?

A. No.

Q. You became president of the association when it was organized?

A. Yes.

Q. And I think continued president until the early part of 1922?

A. Until its death.

Q. It has been testified it died in January, 1922?

A. That is correct.

Q. It ceased to function about that time?

A. Yes, sir.

137 Q. There was an investigation in September, 1921, of the association, was there not?

A. Yes, sir.

Q. An investigation by the Federal Trade Commission?

A. I believe so.

Q. You were interviewed by some representative of the commis-sion regarding the association?

A. Yes.

Q. Did you learn that other members of the association were also interviewed at about the time you were interviewed?

A. Yes, sir.

Q. Did you also learn that there were interviews by examiners of the Federal Trade Commission with sub-jobbers at or about the same time?

A. No; I didn't know how far your investigator had gone or where he had gone.

Q. Immediately prior to the organization of the association what were the discounts that were being allowed by wholesalers in Phila-delphia?

A. The best discount that we allowed anyone was 8% prior to the formation of the organization.

Q. 8% off the list?

A. 8% off the list, on trade-marked merchandise.

Q. Was there any other discount you allowed on merchandise not trade-marked?

A. We sold some merchandise below cost, when it was unsalable.

Q. Are we to understand 8% was the maximum discount you allowed?

A. That was the maximum discount we allowed prior to the formation of the association.

Q. Did you find your competitors were allowing the same discounts immediately prior to the formation of the association?

A. Did our competitors allow greater discounts prior to the formation of the association?

Q. Yes.

A. We were so informed—some of them did. I would not say all of them.

Q. Where did you get that information?

A. That is general trade gossip.

Q. Did your salesmen bring that report to you?

A. Yes.

Q. Did you also find that out because you had lost business to some of your competitors?

A. Well, we may have lost some business to some of the competitors; that may have been the reason and may not. We are not always positive about that—why we lose business.

Q. You are also chairman of the executive committee of the association, as I understand?

A. Yes.

Q. Did the executive committee ever make any report in writing to the secretary of the association or to the association?

A. No.

Q. Did you have anything to do with the hiring of Mr. Kane as investigator for the association?

A. Yes.

Q. Did you—or anybody in your presence—that is, anybody connected with the association, suggest to Mr. Kane what his duties would be?

A. Well, his duties were supposed to be to endeavor to ascertain conditions existing in the trade, incidentally what discounts the various members of the association were allowing the trade—ascertain that.

159 Q. Was that after the association had adopted the resolution fixing the maximum discount at 8%?

A. I could not tell you that; you could probably tell that by the minutes there. I would say probably it was. The minutes would show it definitely.

Q. Did you suggest to Mr. Kane the names of any jobbers you desired investigated or that the association or any committee desired investigated?

A. Did I personally suggest the names to him of any jobbers who were to be investigated?

Q. Yes.

A. I may have; I don't recall, but that is possible.

Q. Did Mr. Kane make any reports to you or to the executive committee during the period he was employed as investigator?

A. He made verbal reports to me, yes.

Q. What are the names of the firms Mr. Kane reported to you?

A. I don't recollect the names of the firms he reported now. The situation was such that he possibly from time to time reported everybody in the association or at least some suspicions of them.

Q. But you think he reported practically every member of the association at different times?

A. The active ones, yes.

Q. You remember, do you not, the adoption of the resolution fixing the maximum discount at 8%?

A. Yes.

Q. Did your company while that resolution was in effect live up to it?

A. We did.

Q. Do you remember the adoption of the resolution by the association fixing the maximum discount at 7%?

A. It was fixed at 7% with an allowance on cigarettes, which practically made cigarettes 8% and cigarettes constituted 75% of the volume of that line.

Q. You remember the adoption of the resolution I suggested in the last question?

A. Do I remember it, did you say?

Q. Yes.

A. Yes; such a resolution was adopted, to cover the cost of merchandise.

Q. Did your company live up to the agreement made by the association?

A. I answered that once before.

Q. This question was directed to the second resolution that was adopted.

A. Yes, it did.

Q. Your company abided by the agreement of the association with respect to both of those resolutions?

A. We did.

Q. Were there any members of the association who did not live up to either or both of those resolutions fixing the maximum discounts?

A. Why, it was so reported. I don't know positively whether they did or didn't. I had no direct evidence one way or the other.

Q. In the case of those who were reported as not having lived up to the agreement, what was done, if anything by the association?

A. If it was reported to me such and such a member was selling goods below cost, I sometimes called on him.

Q. Pardon me, please. Will you be good enough to answer the question in the spirit in which it was asked. I asked you not

161 with respect to the compliance of the agreement expressed in this resolution. I didn't suggest anything about if he found anybody selling below cost.

Mr. CALDWELL. This witness is certainly endeavoring to answer intelligently and fairly these questions, and I think if the answer doesn't exactly suit the attorney examining there ought not to be an attempt to strike out something he doesn't like.

Mr. WALSH. This case is not being decided by the examiner but by the whole commission on the record later.

Mr. SMITH. I want to suggest a reply. I asked the witness what the association did in the event it was reported to the association that its members were not living up to the resolution. That does not call for any discussion about the selling of tobacco products below cost.

The EXAMINER. The witness is an intelligent man; let him answer as intelligently as he can the questions of the attorney. Let the question be read over and see what he has to say to it.

Mr. WALSH. Do I understand "that the witness shall answer the questions as intelligently as he can"? Does that carry with it the implication the witness is not answering intelligently?

The EXAMINER. No.

162 Q. (Question repeated.) In the case of those who were reported as not having lived up to the agreement, what was done, if anything, by the association?

A. If it was called to my attention that some house in the trade was selling goods below what I considered as cost I would frequently call on them and remonstrate with them for such action.

Mr. SMITH. I want a responsive answer to the questions. I asked the witness what, if anything, the association did when it was reported to the association that any of its members did not live up to the resolution and that, of course, doesn't require the witness to testify as to what was done regarding members of the association who sold below cost. I am confining this question to selling at a price violating this resolution which was adopted; whether it was below cost or not.

Mr. CALDWELL. I ask that the attorney for the commission be instructed that he shall not be permitted to interfere and interrupt the witness during an answer but he should be required to wait until the entire answer is in and then make any motion he desires in regard to it.

The EXAMINER. Proceed with the examination, Mr. Smith.

163 Mr. CALDWELL. I take an exception to the interruption of the witness by the attorney for the commission on the ground that it is unfair, prejudicial and improper.

(Exception noted.)

By Mr. SMITH:

Q. Mr. Ebertsch, when it was reported to the association of which you, as its president, that members of the association were not

living up to the resolution then, in effect, what, if anything, did the association do?

(Objected to by Mr. Walsh because there is no testimony heretofore given that any of the members of the association were not living up to the agreement.

Objection overruled; exception.)

Mr. CALDWELL. I further object to it on the ground that this question should not be permitted to be answered until the witness is permitted to continue and finish his answer to the former question in which he was interrupted by the attorney for the commission.

The WITNESS. You want a new answer?

Q. Yes.

A. If it was called to my attention that any member of the trade was selling the goods below cost, I generally called on them and endeavored to demonstrate that the cost of their merchandise was actually what they paid for it plus overhead and if they sold below cost plus overhead, they were selling it at a loss.

164 Q. You said when you found it was reported to you a member of the association was selling below cost you did this missionary work. Did you consider that when a member was reported to be selling at a discount greater than the association had agreed upon he would be selling below cost?

(Objected to because it doesn't appear the association ever agreed upon a discount.

Objection overruled.

Exception.)

A. I didn't think anything about it—I knew it.

Q. That is, you knew what?

A. I knew they were selling goods below cost.

Q. You mean to say when a jobber would sell at a discount greater than the discount agreed upon by the association that would be making him sell below cost?

A. I am sure of it. Yes; positive.

Q. That is, irrespective of the discount that the jobber would be allowing, provided it would be above the discount fixed by the association?

A. I don't quite get you there. I don't understand your question.

Q. Did you feel—or, to use your own language—did you know that the sale of tobacco products of a jobber at a discount greater than had been agreed upon by the association made a sale below cost?

A. Yes.

Q. In the event that the jobbers to whom you talked—that 165 is, jobbers reported to have violated the agreement—not been willing to come in again, what did you then do?

A. Nothing.

Q. What are the names of the jobbers you had these talks with?

A. P. F. Murphy Company was one. M. Blumenthal. That's all I can recall just now.

Q. Murphy Brothers of Camden?

A. Yes; Murphy Brothers of Camden.

Q. Was Victor Fermani a member of your association?

A. Yes.

Q. Is he also one of the persons you talked to in this connection?

A. Yes; I called on him.

Q. Was Charles Seider a member of your association?

A. He was not.

Q. Do you know whether he was invited to join?

A. Yes; I called on him personally. The report was circulated he felt offended because he was not asked to join the association. I called on him personally and I believe a letter was written to him to that effect.

Q. Did he join?

A. He didn't join.

Q. Is Mr. Seider one of the persons that you talked to regarding the selling of his products?

A. I may have said something about it on the visit to him. I don't recall; possibly I did.

Q. Is Mr. Seider one of the jobbers in Philadelphia who was reported to have been selling at a discount greater than that fixed by the association?

A. He may have been one of them.

Q. You think he was, don't you?

A. Possibly he was.

166 Q. After Charles Seider was complained of, or reported as selling at a better discount than had been agreed upon, did you call upon him?

Mr. WALSH. It doesn't appear anywhere that Seider was selling below the maximum discount. This man says he "possibly was."

The EXAMINER. He has asked did he call on him.

A. The question was did I call on him after he was reported? I called on him whether it was prior to that date or afterwards. In fact, I don't recall when he was reported or that he was reported so that there is no possible way of setting the exact date.

Q. Did you call on him before or after you and some others constituting a committee of your association called on the American Tobacco Company of New York.

(Objected to by Mr. Walsh.)

The EXAMINER. Gentlemen, he will tell us whether he called on the American Tobacco Company.

A. There was no committee called on the American Tobacco Company to my knowledge.

Q. Did you call on the American Tobacco Company?

A. It is my custom to go to New York probably twice a month, and frequently I call on both the American Tobacco Company and P. Lorillard Company while in New York.

167 Q. Did you ever call on the American Tobacco Company in New York in 1921 in company with any other jobber or jobbers of Philadelphia?

A. I went over there one time with Mr. Krull on a matter pertaining to a deal they had in effect.

Q. Did you ever call on the American Tobacco Company in company with any Philadelphia jobber other than Mr. Krull?

A. I did not.

Q. So that you and Mr. Krull called on the American Tobacco Company at one time?

A. At one time; yes.

Q. When was that?

A. I don't recall exactly when that was.

Q. Who arranged that conference between you and Mr. Krull and the American Tobacco Company?

A. There was no arrangement as to a conference made.

Q. Did not the local representative of the American Tobacco Company arrange for a conference between you and the officials of the American Tobacco Co.?

A. He did not.

Q. Who of the American Tobacco Company did you and Mr. Krull talk to at that time?

A. I don't recall.

Q. Was it Mr. George Hill?

A. I don't recall who that was.

Q. I understand this was the only occasion when you in company with any other jobber visited the American Tobacco Company?

A. In the course of how many years?

Q. 1921.

A. We didn't go to New York with any other jobber in 1921.

168 Q. You didn't go to New York with any other jobber in 1921?

A. No, sir; I did not.

Q. Did you go in 1920 with another jobber?

A. No.

Q. What was the year?

A. Just let me interrupt you—I have been to New York with jobbers but not to call on the American Tobacco Company or the P. Lorillard Company.

Q. While you were in New York on other business as you say, did you, in company with any of those other jobbers in New York call on the American Tobacco Company?

A. I did not.

Mr. CALDWELL. I object to this until the attorney will state he doesn't include any other time prior to a certain year.

The EXAMINER. I think the time as near as possible should be given the witness.

Q. Was this visit you made or this interview you had with some official of the American Tobacco Company made before or after the organization of the Tobacco Jobbers Association?

A. You mean the visit I made with Mr. Krull?

A. Yes.

Q. Was it after the formation of the company?

A. Yes.

Q. Will you tell us the date of this occasion when you and Mr. Krull went to New York?

A. We had no engagement and I don't recall the date.

169 Q. Do you know the month?

A. No.

Q. Do you remember the year?

A. It was sometime since the organization was formed, and the organization was in existence about a year and a half.

Q. Coming back to the question I asked you about Mr. Seider, was your conversation with Mr. Seider about giving the retail trade a better discount than had been agreed upon by the association before or after you and Mr. Krull had the talk with some official of the American Tobacco Co.?

A. I don't recall that date. I called on Mr. Seider, as I stated before, and asked him to become a member of the association. Whether that was before or after those dates I could not tell you.

Q. I was asking about the complaint about Mr. Seider's company.

A. I have no way of fixing the dates of the complaint.

Q. Without respect to dates, can you recall whether your visit to Mr. Seider on the complaint to the association about him was before or after you and Mr. Krull saw somebody at the American Tobacco Company in New York?

A. I don't know that.

(Adjourned until 2 o'clock in this room, 318 Post Office Building, Philadelphia, Pa.)

170

Docket 886

PHILADELPHIA, October 17, 1922.

Met pursuant to adjournment, 10.00 a. m.

Before: GEORGE MCCORMICK, examiner.

Appearances: Messrs. Walsh, Caldwell, and Taulane for respondents.

NELSON F. EBERBACH resumed the stand and further testified as follows:

Direct examination by Mr. SMITH:

Q. I think you said this morning, Mr. Eberbach, that you do not recall who of the American Tobacco Company you talked with on the occasion when you and Mr. Krull visited the American Tobacco Company's office. Is that correct?

A. Yea.

Q. Did you not, with Mr. Krull, at any time after the organization of the wholesalers' association, visit any manufacturer other than the American Tobacco Company in New York?

A. I don't recollect having visited any other company than the American Tobacco Company.

171 Q. Or anybody of your association?

A. Not that I know of.

Q. Who of the Philadelphia jobbers, members of the association, do you find competing with you for the sale of tobacco products in Delaware and New Jersey, if any?

A. Delaware and New Jersey? Do you want them separately or together?

Q. I would rather have them separately, if you please.

A. The only firm I know of travelling in New Jersey out of Philadelphia in the association was Charles Krull. They had a representative that travels there; they may do business there—I don't know—outside of Murphy Brothers, Camden. They naturally do business in Jersey.

Q. Who of the association competed with your company in the sale of the tobacco products in Delaware?

A. The only concern I know of having a representative in Delaware is Charles Krull.

Q. When you speak of representatives, do you mean travelling salesmen?

A. Yes.

Q. Charles Krull, as far as you know, is the only other jobber member of the association who competed with your company in New Jersey and Delaware except Murphy Brothers?

A. The only concern that has a representative travelling that section that I know of. The others may do business in those States.

Q. Did you find other members of your association did do business in those States, without having representatives travel there?

172 A. I presume some of them did. They would naturally sell to anybody—Jersey or Delaware—if they came into the place, or by mail.

Q. Did you do a mail-order business?

A. What do you mean by mail-order business?

Q. Orders given to you through the mail.

A. We naturally received some orders through the mail.

Q. Do you know what other jobbers of the association filled such orders?

A. I don't know what they shipped.

Q. Do you know whether they shipped any?

A. If they have any orders down there—I don't know definitely who they ship or where they ship.

Q. Who suggested to you or to the association or its members the selection of Mr. Brogan as secretary of the association?

A. He was selected at a meeting against his protest.

Q. Who suggested the selection of Mr. Brogan?

A. I could not tell you that. I don't know. I don't recall.

Q. Do you remember what salary, if any, was paid to Mr. Brogan?

A. I believe the secretary received a fee of \$5 a month.

Q. How was the adoption of the resolution fixing the maximum of 8% discount made known to the members of the association?

A. They were all present at the meeting—at least I think they were and, therefore, heard it that way.

Q. You are quite sure all of the members were present at that meeting?

A. I think so.

173 Q. How was the change of the maximum discount from 8% to 7% made known to the members of the association?

A. So far as I know they were at the meeting and heard it.

Q. You think that all the members of the association were at that meeting?

A. I think they probably were; most of them.

Q. You say most of them were present at that meeting. How was word gotten to those not present at that meeting regarding the change of the discount?

A. I don't know. They may have called up on the telephone or something of that nature.

Q. I show you this paper which has been marked commission's exhibit for identification. Did you ever see that notice or copies of that notice at any time?

A. I don't recollect having seen such a notice although there may have been such a notice.

Q. Do you know such notices were prepared?

A. I don't recollect, although it may have been.

Q. I show you this envelope marked "Commission's Exhibit No. 3" for identification. Will you tell us whether that envelope is the envelope used by the association?

A. Yes.

Q. Do you know whether or not the names of any of the parties you have mentioned as not having lived up to the agreed discounts have been reported to manufacturers as allowing better discounts than those agreed upon by the association?

A. What do you mean reported? By me?

174 Q. By you or anybody else connected with the association.

A. I could not tell you what anybody else did, of course. Members of the association no doubt were interviewed by various representatives of various manufacturing concerns. It is rather the custom in the trade to complain about your competitor. Do you want to know whether I specifically made complaint about someone?

Q. Or whether anyone else in the association made complaints to the manufacturers?

A. I don't know. I may have complained from time to time.

Q. Did you complain about anybody?

A. Possibly I have.

Q. To the representatives of what companies, did you complain?

A. To probably representatives of all the people from whom we bought.

Q. The American Tobacco Company?

A. That would be in that number.

Q. The Lorillard Company?

A. Yes.

Q. Which of the manufacturing tobacco companies did you complain to?

A. I could not tell you inasmuch as they have had three or four representatives here in the last couple of years.

Q. Give us the names.

A. Mr. O'Boyle—the present representative is Mr. Spitzmiller; prior to that they had somebody else whom I can't remember.

Q. What representatives of the Lorillard Company did you complain to about jobbers of Philadelphia not abiding by this resolution?

175 Mr. CALDWELL. Objected to. I object unless he identifies the time or the place.

The EXAMINER. That is a good suggestion.

Mr. SMITH. It of course has to do with this period during which this organization was functioning, particularly 1920—October, 1920, to December, 1921.

The WITNESS. I think the representative of P. Lorillard Company at that time was a man by the name of Fitzgerald.

Q. What was Mr. Fitzgerald's title?

A. He was Philadelphia representative, I believe, of the Lorillard Company.

Q. Does the Lorillard Company maintain an office in Philadelphia?

A. Yes.

Q. And have you been to that office at any time?

A. Yes; I have been to that office once.

Q. When was that?

A. I could not tell you exactly when.

Q. Within the last two years?

A. Yes; within the last two years—just a minute there—I was not inside the office; I only went up to the office to meet Mr. Fitzgerald. I went up to take him out to play golf in the machine.

Q. Do you know what title Mr. Fitzgerald bears as an official of the Lorillard Company?

A. I don't know that he had any title.

Q. Do you know what title Mr. O'Boyle of the American Tobacco Company had?

A. Philadelphia representative. I don't know just what his title was.

176 Q. What was the name of the Philadelphia jobber you complained of to Mr. O'Boyle of the American Tobacco Co.?

A. I don't recall that. Probably we complained about everybody in the trade from time to time. I don't recall specifically complaining about anybody.

Q. What Philadelphia jobber or Camden jobber did you complain of to Mr. Spitzmiller of the American Tobacco Co.?

(Objected to as incompetent, irrelevant, and immaterial.

Objection overruled.

Exception.)

A. I don't recall complaining about anybody. I might mention a number of names, and I might be correct and I might not.

Q. You have a general recollection that you complained about some, but don't remember the names?

A. Yes; ever since we have been in business it is customary to complain about everybody who is disturbing things in the business.

Q. You understand I am asking you about the period during which the organization was in existence?

A. Yes.

Q. What jobber, member of the association, or Philadelphia jobber, not a member of the association (because I understand there were two who did not belong), did you complain about to Mr. Fitzgerald of the Lorillard Company?

177 Mr. CALDWELL. I object on the ground that it is incompetent, irrelevant, and immaterial and not binding on the Lorillard Company.

(Objection overruled.

Exception.)

A. I don't remember that. It has been too long ago.

Q. Do you remember, though, Mr. Eberbach, you did complain of some, but you do not now recollect their names?

A. Yes.

Mr. CALDWELL. I object to this line of examination. I want to interpose an objection about "complaining" as calling for a conclusion. It is immaterial and incompetent until we know something more definite.

(Objection overruled.

Exception.)

By Mr. SMITH:

Q. Mr. Eberbach, you and I have been using the word "complaint"—you in your answers and I in my questions. Do you understand that when I used the word "complaint" and when you used the word "complaint" it was complaint regarding jobbers selling at a discount greater than the discounts agreed upon?

A. Yes.

178 Q. Are there any other tobacco manufacturing companies whose representatives in Philadelphia you made similar complaints to?

A. Similar complaints? What do you mean by that?

Q. Complaints that jobbers were not living up to the agreed discounts.

A. Any complaints that I would make to them would not be relative to that. It would rather be to the effect that they were using other merchandise to further their own merchandise on some other line.

Q. Did you complain to the representative of Liggett & Myers in that respect?

A. I believe we did.

Q. Do you have with you the original letter dated April 2, 1921, addressed to the jobbers organization of Philadelphia care of Nelson Eberbach, from the subjobbers?

A. No; I have not.

Q. You have not?

A. No. There was such a letter, but we are unable to locate it; I don't know what became of it. There was such a letter, however.

Q. Do you have the original carbon copy of the letter addressed to S. T. Banham & Brothers, 4367 Main Street, Manayunk?

A. No; your Federal Trade Commission's investigator has that copy. He took it from our files.

Q. Those letters were given to Mr. Cowie—the carbon copies were given to Mr. Cowie, who is sitting behind you?

A. Yes, sir; the carbon copies were given to Mr. Cowie. I have a copy of it—at least counsel has here. The original carbon copy was given to Mr. Cowie of all those letters which you mentioned.

Mr. SMITH. Mr. Examiner, there are four papers that I want marked now for identification "6, 7, 8, and 9," respectively.

Q. Mr. Eberbach, I show you this paper which has been marked "Commission's Exhibit No. 6" for identification. Will you look at it and tell me, please, what it is?

A. It is a copy of a letter written on that date.

Q. By A. B. Cunningham & Company to S. T. Banham & Bro. Manayunk, Phila., dated February 15, 1921?

A. Yes, sir.

Q. I notice that this letter says: "All of the Baltimore jobbers are getting full list prices in that section by agreement with Philadelphia and they have requested me to get you to cooperate. Otherwise, it will be forced to throw this market open and I am sure you would not care to be the cause of that action." That statement appears in that letter?

A. Yes.

Q. Is that statement true?

A. No; that statement is rather an exaggeration.

Q. So that you say this statement in this letter is not a correct statement?

A. I say that it is an exaggeration.

Q. What is the extent of the exaggeration?

A. For instance, there is no association in Baltimore; nor has there been; we had no agreement with Baltimore to do this;

180 it was rather customary to sell goods in that section at list price.

Q. But that, you say, was not by agreement with Philadelphia jobbers.

A. No.

Q. Were you present at the meeting of the Philadelphia Wholesale Tobacco Dealers Association at which Mr. Davis, of Baltimore, made the instructive and constructive address?

A. Yes.

Q. What did he say at that meeting?

A. I don't remember what he said. He made general statements about trade conditions in particular.

Q. What was the business of Mr. Davis?

A. He was in the wholesale tobacco business.

Q. Whereabouts?

A. In Baltimore.

Q. Was S. T. Banham & Bros., to whom this letter was addressed, a member of your association?

A. He was.

Q. But this letter was sent, however, to Mr. Banham?

A. Yes, sir.

Q. Did you write a letter of which this is a copy?

A. I did.

Q. Why, if it was not true did you state in this letter that all of the Baltimore jobbers are getting full list prices? Why did you say "all of the Baltimore jobbers are getting full list prices in that section by agreement with Philadelphia"?

A. I didn't say that statement was an exaggeration.

Q. That statement is true?

Q. The statement that the Baltimore jobbers were getting list price in that section is true.

181 Q. Is the statement in this letter, as follows, "All of the Baltimore jobbers are getting full list prices by agreement with Philadelphia" true?

A. Not that I remember of it.

Q. Why did you write it?

A. To influence Mr. Banham.

Q. At the time this letter was written were any of the Baltimore jobbers selling in Philadelphia?

A. I could not tell you that. I don't know of any.

Q. Did you hear of any selling in Philadelphia?

A. I heard indirectly there were goods shipped up to Philadelphia from Baltimore.

Q. Who did you hear the goods were shipped by?

A. I don't remember.

Q. Is this statement in this letter, as follows, "and they (meaning the Baltimore jobbers) have requested me to get you to cooperate" true?

A. No; that referred to Mr. S. A. Davis. That should have been "him" rather than "they."

Q. Why did you make this statement in the matter, if not true—that the Baltimore jobbers requested?

A. I made that statement to influence Mr. Banham, so that he would not disrupt conditions in that part of the country.

Q. Did your company ship to Baltimore?

A. No. We sell goods in Baltimore—have a representative—but we do not sell trade-marked merchandise in Baltimore.

Q. Do you sell cigarettes?

A. No; we don't sell cigarettes in Baltimore.

182 Q. Do you sell cigarettes in Harrington, Delaware?

A. We travel in Delaware.

Q. Was W. E. Palmer, of Harrington, one of your customers in January or February?

A. I don't know that; he may have been.

Q. He may have been?

A. Yes, sir.

Mr. SMITH. Mr. Examiner, I offer in evidence this letter, marked "Exhibit No. 6" for identification, and ask that it be marked "Commission's Exhibit No. 6."

The EXAMINER. It is received and will be so marked.

Q. I show you this paper which has been marked "Commission's Exhibit No. 7" for identification. Will you tell us what that letter is?

A. It is a letter written by A. B. Cunningham and the letter is a copy.

Q. Is it a copy of the letter written to P. F. O'Boyle, Heed Building, Philadelphia, March 25, 1921?

A. It is.

Mr. SMITH. This letter, Mr. Examiner, I will read into the record at this time.

Mr. WALSH. It is objected to because there is nothing to indicate O'Boyle ever received it.

(Objection overruled.)

Mr. CALDWELL. Same objection on the part of the Lorillard Company.

(Objection overruled.)

(Exception.)

183

MARCH 25, 1921.

Mr. P. F. O'BOYLE,

Heed Building, Philadelphia.

DEAR SIR: Please be advised that the best price we make to missionary men on your line and all other lines is a discount of 5%. This is the lowest price that our association permits any jobber to make to factory representatives, and if you hear of any competing

factory representatives purchasing goods for less than this price, will you please advise the writer?

Yours truly,

A. B. CUNNINGHAM & COMPANY.

Q. Who is Mr. P. F. O'Boyle of the Heed Building, Philadelphia?

A. At that time he was one of the representatives of the American Tobacco Company.

Q. Was he in charge of the Philadelphia office of the American Tobacco Company?

A. I don't know whether he was in full charge or not.

Q. But his position was of such importance as to address a letter to him rather than anybody else in that office?

A. Yes; as far as I know.

184 Q. Are the statements in this letter which I have just read true or were they at that time?

A. That was the line of discount allowed missionary men.

Mr. SMITH. This letter, Mr. Examiner, I offer in evidence and ask that it be marked "Commission's Exhibit No. 7."

Mr. WALSH. There is nothing to indicate the letter was ever received by the person to whom it was sent. I object to its admission.

Mr. CALDWELL. It is objected to on the same ground by the Lorillard Company. I ask, Mr. Examiner, if you will state whether it is being received as against the Lorillard Company.

The EXAMINER. Note the objections of Mr. Walsh and Mr. Caldwell, and I direct that the letter be received in evidence and marked as requested.

Mr. CALDWELL. For all purposes, as against all of the respondents?

The EXAMINER. I don't think it is necessary for me to make a statement of that kind.

Q. I show you a paper which has been marked "Commission's Exhibit 8" for identification. Will you tell us, please, what that paper is?

A. Letter received from F. A. Davis & Sons, Baltimore.

Q. It is a carbon copy?

A. Yes, sir; a carbon copy, I should say.

185 Q. I show you paper which has been marked "Commission's Exhibit No. 9" for identification and ask you what this paper is?

A. It is a carbon copy of a letter that we wrote to F. A. Davis & Company, Baltimore, under date as mentioned.

Both of these papers, Mr. Examiner, I offer in evidence and ask that the paper known as commission's Exhibit No. 8 for identification be marked "Commission's Exhibit No. 8" and the paper marked "Commission's Exhibit No. 9 for Identification" be marked "Commission's Exhibit No. 9."

Mr. CALDWELL. I object to it on the same ground as heretofore, on behalf of the Lorillard Company.

The EXAMINER. The objection is noted and the papers are received.

Q. Mr. Eberbach, the subpoena served upon you called for the production of reports to the association or to the secretary or the executive committee regarding the selling policy of certain firms mentioned?

A. There was no report made.

Q. So, necessarily, you have not produced them?

A. No.

Q. There were no reports in writing?

A. No reports in writing.

Q. Do you have with you circular 2783 of the American Tobacco Company of June 29, 1921?

A. Yes; 2783.

186 Q. Will you state how that circular came into your possession?

A. Through the mail.

Q. Sent by the American Tobacco Company?

A. Presumably.

Q. This circular came to you from the American Tobacco Company?

A. Presumably.

Mr. SMITH. I offer this in evidence and ask that it be marked "Exhibit No. 10."

(No objection. Accepted.)

Mr. SMITH. Mr. Examiner, the witness has given me the circular of the Lorillard Company and I want to ask Mr. Eberbach how this circular, No. 1369, came into his possession?

The WITNESS. Through the mail.

Q. From P. Lorillard Company?

A. Yes, sir.

Mr. SMITH. Mr. Examiner, I offer this circular in evidence and ask that it be marked "Exhibit No. 11."

(No objection.)

The EXAMINER. It is received in evidence, without objection, and will be marked "Commission's Exhibit No. 11."

Q. Mr. Eberbach, was the visit that you and Mr. Krull made to the American Tobacco Company in New York before or after the issuance of this circular by the American Tobacco Co. on June 29, 1921?

A. That I don't know. I don't remember exactly when we made the visit and whether it was prior to this date.

187 Q. Would it refresh your recollection if I suggested to you that it was on Tuesday, March 1, 1921, when Mr. Krull called at the office of the American Tobacco Company, in company with you?

A. Would what refresh my memory?

Q. Would it refresh your memory if I suggested it was on the first day of March?

A. It may have been on that day. I don't recollect when it was.

Q. Do you think it was in the spring of 1921?

A. I really don't remember whether it was the spring of 1921 or in the fall; it was probably sometime in 1921, but exactly when I don't remember.

Q. You said that you don't remember who you talked to at the office of the American Tobacco Company?

A. No; we were there for a purpose. They had a deal on at that time, which applied to all trade other than sub-jobbers. We were there to ascertain who and what a sub-jobber was—whether certain reports sent in would be paid for by them.

Q. So that one of the reasons which prompted your call was to find out who really were sub-jobbers or what a sub-jobber was?

A. What they classed as sub-jobbers. I wanted to know what that term meant.

Q. What did you find from the American Tobacco Company they meant by that term?

A. They didn't know themselves.

Q. You said you don't remember the name of the party you talked with at this conference. Would it refresh your recollection if
188 I suggested to you that you had an appointment with Mr. George Hill of the American Tobacco Company (vice president) on March 1, 1921?

A. I don't recollect any such appointment.

Q. Would it refresh your recollection if I suggested to you that a committee of sub-jobbers of Philadelphia also had an appointment to call the same day to see Mr. Hill of New York?

A. No; I don't know that the sub-jobbers had any appointment to see him. I don't know anything about that part of it.

Q. Was Mr. O'Boyle of the American Tobacco Company present with you and Mr. Krull or with you at this conference with the officials of the American Tobacco Company in the spring of 1921?

A. There wasn't any conference with officials of the American Tobacco Company that I attended on that date, that I have any recollection of.

Q. I am speaking of the time you and Mr. Krull went to New York to visit the American Tobacco Company.

A. Mr. O'Boyle was not with us at the time I spoke of.

Q. Was he with you at any time?

A. No; I never met Mr. O'Boyle in New York, or went to New York with him that I have any recollection of.

Q. Have there ever been any meetings of the executive committee of the wholesalers' association at your place of business?

A. Was there any meetings? Why, there might have been; yes.

Q. There might have been?

A. There might have been; yes. I don't recollect exactly—
189 it was not customary to meet there, but there might have been such meeting.

Q. How many such meetings were held at your place of business?

A. There were possibly one or two.

Q. Who were present at these meetings?

A. The executive committee, I presume, if there were such meetings.

Q. Anybody else present at these meetings?

A. Not that I know of.

Q. Were any of those meetings had any time when representatives of the American Tobacco Company or the Lorillard Company were present?

A. Not when I was there.

Q. Were there when you were not there?

A. Not that I know of.

Q. Is there any correspondence or was there any correspondence between the association of which you were president and the Lorillard Company regarding the circular which is in evidence known as commission's Exhibit No. 11?

A. No.

Q. Was there any correspondence between the association and the American Tobacco Company regarding the American Tobacco Company circular?

A. I think not, unless the secretary wrote something. I don't think he did. I have no recollection that he did.

Q. Do you have with you any correspondence between you and the American Tobacco Company and the Lorillard Company called for in the subpoena?

A. Yes; the regular correspondence. There is nothing in it pertaining to this matter.

190 Q. Mr. Eberbach, according to the minutes of the meeting of the association, held April 4, 1921, a letter from the Philadelphia sub-jobbers was read and referred to the executive committee for consideration. From these minutes it appears that you presided at that meeting. Will you tell us please what decision was made that was reached by the executive committee on that letter of the sub-jobbers?

A. We ignored it.

Q. The minutes of this meeting also state that it was moved and passed that a committee of two be appointed to call on R. J. Reynolds Company at the expense of the association. Do you remember who were the two that were appointed as that committee?

A. There wasn't any committee appointed.

Q. Why was it no committee was appointed?

A. We simply ignored it. We used to have resolutions passed to regulate the affairs but no attention was paid to them.

Cross-examination by Mr. TAULANE:

By Mr. Taulane:

Q. You have been subpoenaed by the commission in this case?

A. Yes, sir.

Q. When was the association dissolved?

A. The association ceased to function last January and was formally dissolved in June.

Q. Of this year?

A. Of this year.

Q. When did it cease to function?

A. January; first of the year.

191 Q. That was due to what?

A. It slowly disintegrated, as associations of this character always do. I have found these associations spring up every seven years and last about one year.

Q. Mr. Eberbach, was there any resolution or action on the part of the association definitely fixing the prices of any products?

Mr. SMITH. That is objected to because the two resolutions speak for themselves.

Mr. TAULANE. They do not fix this thing. I am asking what the association did. I am not talking about the resolution.

The EXAMINER. I will permit him to proceed with the cross-examination.

A. No; it was not the intent and purpose of the association to fix prices as the intent and purpose of the association was to educate its members to regard overhead as part of the cost of said merchandise and the prices that the various members of the association obtained from the trade was what we considered cost and the prices varied with each house and many times with each customer.

Q. This discount that has been spoken of as 8% and then 7%—is that a fixed one or just a maximum one?

A. Maximum.

Q. In the course of your business and also in the course of the business of other members, were goods sold with a less discount to other customers?

A. During the life of this association?

Q. Yes.

A. Yes.

192 Q. Now, what discount did the jobbers get on such goods as cigarettes coming from Philadelphia?

A. 10%, and 2% for cash.

Q. If you sell it for 8% to the retailer your profit is 4%?

A. 4%.

Q. Can you tell us what is the actual cost to do business?

Mr. SMITH. I object to that question. Does it mean the cost of doing business for the company with which this witness is connected?

Mr. TAULANE. Yes.

Q. You have been in the tobacco business how long?

A. 35 years.

Q. You are familiar with the doing of the business, what it costs to carry it on?

A. Yes.

Q. Particularly the jobbing business?

A. Yes.

Q. In your business what is the overhead or cost to do business in tobacco?

A. It necessarily varies with some houses. The overhead of conducting a jobbing tobacco business necessarily does vary with different houses; in my opinion no house doing any volume of business can do it for less than an overhead of 4%, and from that it will run up as high as 7%. In our case last year our overhead amounted to 6 1/8%.

Q. And the purposes of the association in these resolutions you passed was to educate the jobbers in Philadelphia to so conduct their business that they would not sell below cost?

A. That was the idea. To rescue the jobber from the selling
193 of goods below cost; to show him that if he continued selling goods below cost he would necessarily become financially involved or be compelled to cease doing business.

Q. Was there any thought on your part or the part of any of the members of the association in passing these resolutions to eliminate competition?

Mr. SMITH. That is objected to. The acts speak for themselves.
(Objection sustained.)

Q. Was there anything discussed at any meetings of the association or anything said at any of those meetings as to suppressing competition among the members?

(Objected to.)

A. What was said? No; there was nothing said or no move made tending toward lessening competition.

Cross-examination by Mr. WALSH:

Q. Mr. Eberbach, I call your attention to commission's Exhibit No. 11 and ask you to look at it a moment. Are you familiar with the contents of this letter and the matter under discussion therein?

A. I am.

Q. This is the letter which counsel for the commission read into the record: "Please be advised that the best price we make to
194 missionary men on your line and other lines is a discount of 5%." Will you tell us first what a missionary man is?

A. What is known as a missionary man in the tobacco business is a salesman for a factory, whose duties are to sell the trade new brands of smoking tobacco or cigarettes or whatever it may be. His duties consist in making introductory orders.

Q. Did the American Tobacco Company at the time of the writing of this letter and immediately prior thereto have missionary men in the Philadelphia territory?

A. They did.

Q. And how did these missionary men operate?

A. It was their custom to go to the jobber and purchase the merchandise and take it out and sell it to the retail trade.

Q. That is, when one of these missionary men of the American Tobacco Company would come to A. B. Cunningham & Co. he would say "I want a half dozen cartons of Lucky Strike cigarettes." That is true, is it?

A. Yes.

Q. What price would you charge him—the same as you would some other jobber or retailer—what price would you make?

A. At that time we made him a list price less 5%, as stated in the letter.

Q. That is what this letter refers to?

A. Yes.

Q. The goods purchased from the missionary men—from A. B. Cunningham & Company?

A. Exactly.

Q. Was there some sort of a controversy between you and Mr. O'Boyle, the representative of the American Tobacco Company, as to the price A. B. Cunningham should sell the missionary men of the American Tobacco Co.?

A. What caused that letter was some of the missionary men were purchasing goods at various discounts and various prices from jobbers.

Q. That is, these missionary men would go to the jobber and buy goods for distribution?

A. Exactly.

Q. How would they dispose of these goods?

A. They took them out and sold them to the retail trade.

Q. And that is for the purpose of advertising the business of the American Tobacco Company?

A. Exactly.

Q. To what extent are these purchases made by the missionary men of the American Tobacco Company?

A. What volume?

Q. Yes.

A. That I am unable to state. If they are introducing a new brand it sometimes amounts to quite a little; but it is no factor at all; we personally care nothing for it.

Q. The sum and substance of this letter, commission's Exhibit No. 7, is there was a controversy between Mr. O'Boyle and you—you were not selling the goods to the missionary men cheap enough?

A. That's the idea.

MR. WALSH. I renew the motion to strike out.

THE EXAMINER. The motion is overruled.

(Exception allowed.)

MR. WALSH. I wish to have the record show I make the motion to strike out; it is no part of any evidence and does not tend to prove any allegation claimed in this proceeding.

THE EXAMINER. In the course of the examination of Mr. Ebertach by Mr. Taulane I overruled an objection of the respond-

ent's attorney regarding the suppression of competition; at least I permitted him to ask if anything was said upon the suppression of competition and he answered "we did nothing to suppress competition." I direct that that be stricken out.

Mr. CALDWELL. I except to that, on the part of the Lorillard Company.

Mr. WALSH. I except to that ruling on the part of the American Tobacco Company.

By Mr. WALSH:

Q. Did you, as president of the association, or otherwise, ever request the American Tobacco Company, P. Lorillard and Company, or any other manufacturer to do anything relative to any jobber allowing a greater discount than 8%?

A. No.

Q. Was there any request on the part of you or on the part of the association to any manufacturer to cut off any jobber because he allowed his customer a greater per cent than 8% or 7%?

A. No; we had no such power or authority and made no such requests.

Q. Was there any request directly or otherwise on the part 197 of any member of you and your association for the cooperation of any manufacturer in the activities of your association?

A. I can't speak, of course, for any member of the association. As far as cooperation of any kind is concerned it was optional with them to do whatever they wanted with reference to their own merchandise and the way it was handled—we had nothing to do with that.

Q. No report was ever made to any manufacturers relative to the activities of the association on the part of the association?

A. What do you mean by "activities"?

Q. Did you make reports to any of the manufacturers relative to the activities of the association?

A. Relative to what the association was doing?

Q. That is what I mean exactly.

A. No.

Q. You stated that you and Mr. Krull called at the office of the American Tobacco Company of New York because there was a "deal" on relative to subjobbers. That was not quite clear on the record, and I didn't understand, Mr. Eberbach, just what you did mean relative to a "deal" on.

A. From time to time it is customary for manufacturers to put out a "deal"; they say, "You sell, for instance, so many thousand cigarettes in combination with two other brands and report that sale to us and we will mail the retail dealer a check, say, for 35c," or any amount they see fit. About that time there was a deal in effect; there was a circular on that deal, which was read, 198 which didn't apply to subjobbers. These reports were sent in and my recollection of it was a number of them were turned down because they were thought to be subjobbers.

Q. And I understand you and Mr. Krull went in to get an interpretation on that deal or the terms of that deal?

A. Yes; we had some reports which involved quite a little money and we had not received a check for them.

Q. As I understand you have been connected with the tobacco jobbing business in Philadelphia for nearly 35 years?

A. Yes, sir.

Q. Just what function in the tobacco trade does the jobber fulfill?

A. He is a distributor. Without the jobber it would be difficult for a manufacturer—for a small manufacturer—to get the distribution of his brand of merchandise; with the assistance of a jobber who carries all lines, he is able to supply a dealer with everything he wants. That is the function of a jobber.

Q. Why can not the manufacturer sell his goods to the retailer directly, or why is it not to his advantage to do so?

A. Because it would be more expensive to him than selling it through the jobber who carries a full line of manufacturers' products. If we only had the line of the American Tobacco Company in Philadelphia our overhead would be greater because we could not do the volume of business; not having all manufacturers' lines, it would cost the manufacturer at least 10% to deliver his own merchandise to the retailer and moreover, another function of

199 the jobber is to extend credit to the retail dealer. The merchandising of tobacco to-day is largely based on credit. The small dealer would be unable to exist without credit, would be unable to get started in many instances; after he is started, one of the functions of the jobber is to give him a line of credit.

Q. What economic function does a sub-jobber exercise in the industry?

A. The term "sub-jobber" is a term which is not definite; it is a term which has never been definite; the sub-jobber grows from a large retailer; he supplies a demand first in his immediate neighborhood for what, you might say, are stands or small candy shops, who run out and buy 200 cigarettes or a dozen or two smoking tobacco, when they have the money to buy it. From that he sometimes develops from the little neighborhood business so that in the middle of the day he will go out soliciting little business; from that on sometimes he buys an automobile or wagon and with a light overhead at first he develops and his overhead grows and then he "busts" very often, and the jobber gets the bill.

Q. That has been your experience?

A. Our sad experience.

Q. Now regular jobbers, such as A. B. Cunningham & Co., keep a warehouse and have stock on hand in considerable amount. Is that true?

A. Yes.

Q. And are required to keep a considerable amount of stock on hand in order to meet the requirements of the trade?

A. Yes; we carry merchandise stock of three to four hundred thousand.

200 Q. In reference to the range of territory operated by the jobbers generally in a community, how does that generally run, Mr. Eberbach?

A. What territory do they cover as a rule?

Q. The limitations of the territory they cover?

A. As a rule, they are limited to a territory within a short radius of their home town. If they get very far away, they run into a local jobber, which exists in mostly every good-sized town, as a local jobber. Therefore, as a rule, they can't develop much business in that section because of the expense of getting the goods to that customer.

Q. That is, a local jobber can sell cheaper than you can if you go too far away from here?

A. That is the idea.

Cross-examination by Mr. CALDWELL:

Q. Are you not mistaken about the Lorillard Tobacco Company ever having any office in Philadelphia?

A. No; I think they had an office in Philadelphia; at least, they had a warehouse or something—that is, the representative had an office.

Q. Did you ever visit any representative of the Lorillard Company where you saw the name "Lorillard" on the building?

A. No; I never saw the name "P. Lorillard" on the door; probably it was the individual's name on the door.

Q. Then that was rather a conclusion of yours than an allegation of fact?

A. I made that as a general statement. I never saw the
301 name on the door. I don't know whether there was anyone else in the office or not.

Q. You never saw Mr. Fitzgerald's name on the door?

A. No; I don't recall seeing his name on the door.

Q. Then it was a mere assumption on your part that the Lorillard Company had an office here?

A. That was an assumption on my part.

Q. Do you recollect any date upon which you made any complaint to Mr. Fitzgerald of the Lorillard Company?

A. No; I don't recollect any particular dates?

Q. Do you recollect any definite complaint made at any time to
him?

A. No; I don't recollect any definite complaint.

Q. What complaint, if any, to Mr. Fitzgerald do you recall having made in the years 1920 or 1921?

A. I answered that previously. I don't recollect any particular complaint. It was rather customary to make complaints about mostly everybody.

Q. May those complaints have been about failure to deliver goods on time or the condition of the goods or something of that kind, other than reference to price or discounts?

A. What do you mean—merchandise from the factory? They may have been.

Q. Do you recall having complained to Mr. Fitzgerald about any particular individuals?

A. No; I so stated before. I don't recall making complaint about any particular individuals. I may have complained about somebody, but I don't recall who it was.

202 Q. You have in mind just some kicking about things in general rather than any specific complaint?

A. That is rather the idea.

Q. How long have you lived in Philadelphia?

A. All my life.

Q. About how old are you?

A. Fifty-one.

Q. In what capacity have you been engaged in the tobacco business?

A. What capacities?

Q. In what ways?

A. From office boy up.

Q. In what capacity at the present time?

A. Executive.

Q. How long have you been engaged in the tobacco business on your own account?

A. How long have I been a member of the firm of A. B. Cunningham Company?

Q. Yes; or if you did business on your own account before that.

A. About 30 years.

Q. During the period in which you have been engaged in that business, have you from time to time studied the business in general and kept yourself posted in it?

A. I tried to.

Q. From your general knowledge, would you state it to be a fact that the tobacco business is one of the big business enterprises in this country?

A. I don't think there is any doubt about that.

Q. Would you say a large number of the people of the United States use tobacco in one form or another?

A. I would.

Q. Is a large part of the tobacco used in the United States produced in this country?

A. Yes.

203 Q. Is a large part of the tobacco used in the United States manufactured in this country?

A. It is.

Q. Would you also state from your general knowledge of the tobacco business that a substantial part of the Federal revenue is derived from taxation on tobacco in one form or another?

A. I judge so.

Q. In the tobacco business in the United States is the general method of distribution that the grower of tobacco sells to the manufacturer, the manufacturer to the wholesale jobber, and the wholesale jobber sells to the subjobber and also to the retailer, and the retailer to the consumer?

A. It is.

Q. And each of those, namely, the grower, manufacturer, wholesale jobber, and retailer perform necessary and useful parts of the process of getting tobacco products to the consumer?

A. They do.

Q. Is this method I have outlined peculiar to the tobacco business or is it the general method of business applicable to other large businesses?

A. That is too broad a question for me. I would not care to answer it.

Q. Whether a similar method would apply to groceries and shoes?

A. A similar method applies in the grocery line.

Q. Candies?

A. I would say yes.

Q. Do you know about boots and shoes?

A. No.

Q. Or dry goods?

A. No.

Q. Soaps and drugs?

A. I suppose that would come under the head of groceries; 294 I presume drugs do, too. I am not competent to answer on that.

Q. In your opinion, doesn't the tobacco business in one form or another furnish employment to a large number of people?

A. It does.

Q. Now, going back to the Philadelphia Wholesalers' Association, the Philadelphia Jobbers' Association, you form one of the necessary links in getting tobacco products to the consumer?

A. Yes.

Q. Have there been wholesale tobacco jobbers in Philadelphia for a great many years?

A. Yes.

Q. And they have helped to make Philadelphia the great business center that it is?

A. Yes.

Q. In your judgment, is it conducive to good business or to the general welfare of the tobacco industry that the wholesaler, the wholesale tobacco jobber, would be deprived of a reasonable profit?

A. If he doesn't receive a reasonable profit he will ultimately go into financial trouble and necessarily disrupt a machine that should function for distribution.

Q. I will ask you this question: In your judgment, if the jobber is forced to sell tobacco products so close to the purchase price as to leave practically no margin of profit, does he not soon lose interest in those products and if he sells at a loss will he not sooner or later fail and go out of business?

Mr. SMITH. Objected to; first, because it calls for an obvious answer; second, because it is irrelevant and immaterial; thirdly, because there is nothing in this proceeding to warrant the insinuation contained in the question that the Federal Trade Commission by these proceedings is attempting to deprive the jobber of an ultimate profit if he obtains it in a proper way.

Mr. WALSH. I answer that if the Federal Trade Commission had made thorough investigation they would have found these jobbers could not have lived unless they made at least 4% profit.

A. Such conditions exist to-day. Under practices which are now in effect the jobber in tobacco is either forced to adopt other side lines and give tobacco very little attention or he will be compelled to go out of business. In other words, in order to make a living out of the business it is necessary for him at the present time to sell other lines than tobacco and cigarettes. He can not make his overhead on that alone to-day.

Q. State whether or not in years past there were a large number of wholesale jobbers in Philadelphia who dealt in tobacco products exclusively, and state whether or not in more recent years, because of the increased cost of doing business, cutting of prices, by jobbers and sub-jobbers, the wholesale jobbers in large numbers have not had to add candy, chewing gum, and other various products to the business?

A. Yes.

206 Q. With it all have they not had a very hard time to make a reasonable profit, or living wage, and that there are now only a few wholesale jobbers left in Philadelphia who deal exclusively in tobacco products?

Mr. SMITH. I object to that question; it is impossible of a truthful answer.

The EXAMINER. The witness may try to answer it.

The WITNESS. I think I understand the question. The condition as stated is correct. I speak primarily for our own business, which to-day is more on products other than tobacco and cigarettes and trade-marked merchandise than it was any time in its history and I think that condition prevails with a number of other houses.

Q. Did you find with all these conditions, the wholesale tobacco jobbers of Philadelphia have had a very hard time making a reasonable profit in the last few years?

A. There is no question about that; and you could ascertain that definitely by looking at the books.

Q. Which way would you answer it?

A. He has.

Q. He has had a very hard time?

A. Very.

Q. Are there remaining only a few wholesale tobacco jobbers in Philadelphia who deal exclusively in tobacco products?

A. Very few, if any.

207 Q. As I understand it, it was practically because the Philadelphia tobacco jobbers were getting into a condition where there was no profit in the business that they formed an association among themselves to try to better their business conditions, and all they wanted was to get a fair and reasonable living or profit out of their business; that is all they ever sought. Is that so?

MR. SMITH. Objected to as calling for a conclusion.

The EXAMINER. I don't think that is a proper question. Exception noted.

MR. WALSH. Would your honor mind stating on what ground you make the ruling?

The EXAMINER. You are asking this man to give a conclusion. It is a very large and comprehensive question.

MR. WALSH. I will, with your honor's permission, divide it up.

Q. Prior to the information of the tobacco association in Philadelphia in 1920 were the wholesale tobacco jobbers getting into a condition where there was no profit in the business?

MR. SMITH. Objected to. Let's find out first whether this witness knows.

The EXAMINER. See whether he knows first or not.

208 Q. I will ask to state whether or not just shortly prior to the formation of this Philadelphia jobbers' association the wholesale tobacco jobbers were getting the cost of their products?

MR. SMITH. Objected to because while he may be able to answer as to himself in his own company, it does not follow he can answer as to any other company.

The EXAMINER. If he knows the condition of other companies besides himself, let him state.

A. I base my knowledge of my competitors' business on their own statements, and from their statements about that time none of them were making any money and were seriously disturbed about the outlook.

Q. Were they actually making cost?

A. No; they were selling practically below cost.

Q. And that was true of the products of the Lorillard and the American Tobacco Company?

A. Very much so.

Q. Do I understand from your testimony that while you and members of the association invited other jobbers to join the association, you never threatened or intimidated or penalized anyone for not joining?

A. No; we had no power to do anything of that kind.

Q. No one ever threatened or intimidated or penalized them for not adhering to the resolutions of the association?

A. We did not.

Q. What, in your judgment, is a fair and reasonable per cent profit that a wholesale tobacco jobber should be permitted to make in Philadelphia, considering the conditions in general as they existed in Philadelphia, at the present time and as they have existed for the last three or four years?

(Objected to by Mr. Smith as calling for something that is quite irrelevant.) It is quite irrelevant what the judgment of this witness is as to the percentage of profit that other jobbers or he himself should secure in Philadelphia. What difference does it make what he thinks a fair percentage of profit?

MR. CALDWELL. It makes a great deal of difference.

THE EXAMINER. It simply goes to the good faith.

MR. WALSH. It goes to the good faith, and this is a proceeding instituted in the interest of the public to know whether these people were profiteering on the public.

A. 10%.

Q. In your judgment, should the Federal Trade Commission take into consideration the welfare of the wholesale jobber as well as the welfare of the consumer?

(Objected to by Mr. Smith.)

Objection sustained.

(Exception.)

210 Q. In your judgment, would it result finally in injury to the consumer if the wholesale tobacco jobber was entirely eliminated?

(Objected to.)

THE EXAMINER. Let him give his opinion about that.

A. It would be detrimental to the consumer, inasmuch as he would be unable to secure as readily the brands which he is accustomed to using because the distribution would not be complete.

Q. Do you think that the Federal Trade Commission in the exercise of its powers should find some solution of the difficulty and fix some fair and reasonable per cent of profit that the wholesale jobber should be permitted to make in Philadelphia?

(Objected to.)

Objection sustained.

(Exception.)

Q. Have you ever made any visit to or request to the Federal Trade Commission to state any percentage of profit that would be fair and reasonable that the wholesale jobber might be permitted to make?

A. Have I personally?

Q. Yes.

A. Such action, I believe, was taken by the National Wholesale Tobacco Dealers' Association.

THE EXAMINER. The answer is stricken out as not responsive.

211 By Mr. WALSH:

Q. Are you a member of the association to which you referred?

A. Yes.

Q. And did you know of the action of that association?

A. Yes.

Mr. CALDWELL. Then I ask that the answer be reinstated.

The EXAMINER. I still rule that it is stricken out.

Mr. CALDWELL. I want to take an exception to the exclusion of this testimony.

(Exception allowed.)

Cross-examination by Mr. TAULANE:

Q. Mr. Eberbach, those letters referred to—to whom did you give them?

A. Mr. Cowie, whom, I understood, was a Federal commissioner and so represented himself.

Q. At the time you gave him those letters, did you ask him to point out to you whether the action of your firm or association was legal?

A. Yes; we made such a statement to him, that if any action on the part of our association was not legal we would be glad to be advised of it.

Q. And you would do what if so advised?

A. Discontinue such practices.

Q. Mr. Eberbach, with the maximum discount of 8% on these goods you purchased from the Lorillard Company and the American Tobacco Company, did that leave you as a jobber any

212 profit?

A. No; it did not. It did not leave us any profit, and if we sold nothing but the line of trade-marked merchandise we could not continue in business.

Q. That is, allowing the maximum discount of 8%?

A. Yes. The only reason that was continued was to reduce our overhead.

By Mr. WALSH:

Q. With reference to complaints being made by you with reference to your competitors, I understood you to say in all the years, in competition with your competitors, complaints were constantly being made against you and by you against others of the trade, and that always has been relative to prices?

A. That is the practice of the trade and always has been.

Q. Was there any more complaints or was this practice of complaining any more prevalent during the period this association was in existence than it was before or after?

A. Not in my opinion; no.

Redirect examination by Mr. SMITH:

Q First, as to Mr. Cowie. Isn't it true Mr. Cowie said he was an examiner for the Federal Trade Commission and not "a Federal Trade commissioner"?

A I may have gotten the term wrong. I should have said "examiner."

Q Mr. Cowie is in the room to-day?

A Yes, sir.

Q And sits behind me?

A Yes, sir.

213 Q Are you making any money in your business to-day?

A I think so.

Q I am asking you whether you are?

A We can't determine that until we take account of stock.

Q Were you last year?

A No.

Q Did you make any money the year before?

A Yes; some.

Q That was 1920?

A Yes.

Q Did you make any money in 1919?

A I think so.

Q In 1918?

A I think so.

Q In 1917?

A Yes; I would say so.

Q In 1916?

A Now, you are going into ancient history. I can't answer those questions.

Q 1919, 1918, and 1917 you made money?

A Those were war years, you will remember. Yes.

Q What is the year that stands out in your recollection, if there is any that stands out, in which your business was conducted at a loss prior to 1916?

A It was never conducted at a loss.

Q It is fair to say up to 1920 your business was conducted at a profit?

A Yes.

Q I think you said 1919?

A Yes.

Mr. TAULANE. You understand these goods only form a part of his business.

Q Will you answer the question?

A Yes; it was conducted at a profit for the reason that it was not on trade-marked merchandise.

214 Q I would like to have a yes or no answer.

A Some questions can not be answered yes or no.

Q. Do I understand you to say all the time you have been with A. B. Cunningham Company through 1919 up to 1920 the business was conducted at a profit?

A. Yes; at a profit, but sometimes a very small profit.

Q. But in all that period there was no loss?

A. No actual loss.

Q. How long had A. B. Cunningham & Co., prior to the organization of this association, been selling tobacco products at a maximum discount of 8% off list?

A. That I could not tell you. I don't know exactly.

Q. How long had A. B. Cunningham & Company, prior to the organization of this association been selling tobacco products at a maximum discount of 8% off list?

A. That I could not tell you; I don't know exactly how long we didn't pretend to sell all our merchandise at 8% off the list.

Q. How long prior to the organization of this association was A. B. Cunningham & Co. selling at 8% off list, these particular articles covered by the resolution adopted by the association in October, 1920?

A. Why, possibly one year; somewhere around there.

Q. That would bring it in 1919, would it not?

A. I should judge it would, admitting the dates are correct.

Q. And that is one of the years when you say you made a profit?

A. Yes; we made a profit.

215 Q. What was the discount allowed by A. B. Cunningham & Co. on these tobacco products covered by those resolutions of the association, prior to the discount of 8% put into effect by the resolutions?

A. I don't understand the question.

Q. I don't blame you for that. I understood you to say for about a year previous to the formation of the association your discount had been 8%, as to the things the resolution applied to?

A. I don't mean to say we sold all trade-marked merchandise at 8%. We did sell some as low as that.

Q. I am confining my questions, if you please, to the things covered by the resolutions of the association and I understood you to say on your cross-examination that your discount on these articles for about a year prior to the formation of the organization, was the same discount as the organization adopted?

A. It was sometimes as low as that.

Q. Do you mean the discount was sometimes as low as that or the price was as low as charged by deducting the discount?

A. I don't see the distinction.

Q. You say sometimes your price was lower than 8%?

A. No. I said the discount was sometimes—the maximum discount—we didn't sell all the merchandise at 8%; some might be 7% and some might be 5%.

Q. I am speaking of the articles covered by the resolution of the association.

A. That is what I refer to exactly.

216 Q. I understood you to say that for a year prior to the organization of the association A. B. Cunningham & Company's discount on these articles had been 8%. Was I correct in my understanding?

A. No. I didn't make that statement.

Q. What statement did you make?

A. We did sell some merchandise with that discount, but not all.

Q. What was the maximum discount?

A. 8%.

Q. What was the minimum discount?

A. I could not tell you—2%.

Q. So that when you speak of a lower discount than 2% you mean a lower discount in percentage off the list?

A. Yes.

Q. That means that a lower percentage of discount means a higher price you secured from the retailer?

A. Yes; in some instances.

Q. So that I want to ascertain what was the highest discount you allowed on these things covered by the two resolutions of the association prior to the time when your highest discount was 8%.

A. The firm of A. B. Cunningham & Co.?

Q. Yes.

A. The highest discount we allowed prior to the formation of this association? Is that it?

Q. You answered that question. You said it was 8% for a year prior to the organization of the association. I am trying to find what was the maximum discount prior to this 8% discount?

A. When; thirty years ago?

Q. Immediately prior to the putting into effect of the 8%?

A. I can't answer that question.

217 Q. Do you know whether it was 9% or more?

A. I can't answer that question.

Q. Was there any organization of tobacco jobbers in Philadelphia in 1912?

A. No.

Q. In 1918?

A. No.

Q. In 1917?

A. No.

Q. In 1916?

A. No.

Q. In 1915?

A. I think not. You are going very far back now. I can't answer definitely.

Q. Well, A. B. Cunningham & Co. did business at a profit in that period from 1915 up to 1919 without being a member of any tobacco jobbers' association?

A. That was a war period when a blind man could make money.

Q. There was also other periods during your experience with A. B. Cunningham Co. where they were not, and where A. B. Cunningham made money?

A. Sometimes on a rising market it is sometimes possible.

Q. That is what a jobber tries to prepare himself for?

A. No; if he waited for that he would starve to death; that occurs very infrequently.

Q. You spoke about the variance of overhead. What do you estimate to be your present overhead?

A. Why, I made the statement of what our overhead was last year. What it will be this year we are unable to determine until the end of our fiscal year.

Q. Has your overhead varied from year to year?

A. Yes; it has varied at times.

Q. What has been the highest overhead in percentage in your company in your recollection of the last three years?

A. Last year was probably as high as any.

Q. What was that?

A. About 6½%.

Q. What was it the year before?

A. Why, before it was about 5%.

Q. What was the reason for the difference?

A. Well, the shrinkage in prices, cost, and decreased volume of business; increased salaries, which had not been reduced owing to unsettlement, and other general expenses which accumulated during war times, which had not adjusted themselves. Our average expense is about 5% ordinarily.

Q. 5% of what?

A. 5% on our sales.

Q. You spoke of the similarity in the method of distribution as between the tobacco industry and the grocery trade. You spoke of grocery sub-jobber. What is a sub-jobber in the grocery business?

A. I didn't speak of any. I don't know anything about it.

Q. I asked you because I had a note of a sub-jobber in the grocery business when you were being cross-examined, and I was curious to find out what is his function. In your cross-examination by the attorney for the Lorillard Company, in which is outlined the method of distribution of tobacco, suggesting the various methods of distribution and the means of distribution you mentioned, as you remember, the sub-jobber. Do you remember the next question was as to your opinion as to whether the different means of distribution were necessary in the trade but you omitted to include the term "sub-jobber" in the question?

A. What?

219 Q. The attorney for the Lorillard Company omitted, purposely or not, to mention the sub-jobbers as a necessary means of distribution?

A. I didn't notice that.

Q. Do you think among the other means of distribution of tobacco products, the manufacturer, the jobber, and the retailer, the sub-jobber is a necessary party or element?

A. Well, to answer that question you must define what a sub-jobber is. I have never known personally. Therefore how am I going to tell you whether a sub-jobber is necessary when I don't know exactly what the definition of a sub-jobber is?

Q. Is that the reason you can't express an opinion as to whether a sub-jobber is a necessary element in the distribution of tobacco products?

A. Yes.

Q. You have heard the term "sub-jobber"?

A. Frequently.

Q. There have been a lot of them in Philadelphia?

A. Yes.

Q. And an organization of them?

A. I don't know of any organization of them in Philadelphia; there may be.

Q. Don't you know of the association formed by the sub-jobbers?

A. Four or five of them said they had an association.

Q. You don't have any reason to doubt that?

A. Yes; I doubted because, as I understand, nobody ever paid any dues.

Q. That is the reason you doubt they had an association?

A. Yes; because they had no financial backing.

220 Q. You do know there was a letter addressed to your association signed by some fifteen or twenty, more or less, men in the tobacco business who called themselves sub-jobbers?

A. Yes.

Q. Did you know some of them?

A. Yes.

Q. Had some of them been customers of A. B. Cunningham Co.?

A. Yes.

Q. What became of their purchases from A. B. Cunningham & Co.? What became of their purchases after the adoption of the resolution?

A. What do you mean—the merchandise they bought from us?

Q. No. Did they continue buying from A. B. Cunningham?

A. Yes; to a more or less extent.

Q. Tell us whether it was more or less?

A. It was presumably less.

Q. It was less?

A. I think so.

Q. Some of them were forced out of business?

A. No; none that I know of. All the signers of that paper as far as I know—I recall only four or five of them—there may have been more, but they are all in business to-day.

Q. Mr. Eberbach, you realized at that time and you realize now that the effect of the resolution adopted by the association, fixing the maximum discount at 8%, was to bring about a situation where the retailer could purchase from the members of the association; that is, assuming the resolution was lived up to, at just as good terms as he could buy from the sub-jobber?

A. No; the sub-jobber could continue in business, and he did continue in business.

Q. Isn't it a fact that the effect of the resolution fixing the maximum discount was to permit the retailer to buy from the wholesaler at exactly the same or at better price than the sub-jobber could buy?

A. He could do that if a jobber saw fit to sell him at those prices, but this so-called sub-jobber, as I stated before, as a rule handles small trade and the small trade pay a greater price and did all during the life of this association, than the larger trade.

Q. What have you found to be the function of the sub-jobber of tobacco? What function does he serve in Philadelphia or has served in Philadelphia?

A. What function? I stated that before. As a rule he supplies a very small class of trade.

Q. How do you define a sub-jobber?

A. I don't know what the definition is. There is no place to start. Any retailer that does a business of \$100 a week calls himself a sub-jobber.

Q. Is that the situation in Philadelphia?

A. Yes.

Q. How long has that been the situation here?

A. Oh, indefinitely.

Q. On that account has it been your experience he ask a better discount than if he were a smaller purchaser?

A. Oh, yes; he always asks for a better discount no matter what he gets.

Q. Before the organization of the wholesalers came into existence the sub-jobber got a better discount than the retailer?

A. They did from some houses but not from us.

Q. But after the association went into effect the advantages the sub-jobber had before the association was formed, disappeared, didn't they?

A. Some of them paid a little more for their stuff than before; yes.

Q. You passed an opinion, on your cross-examination, that it cost the manufacturer 10% of his manufacturing cost to deliver. Upon what did you base that?

A. I don't get you there.

Q. You passed an observation on your cross examination by the attorney for the Lorillard Company that the cost of distributing by the manufacturer, if there were no wholesalers, would be 10% of his production cost?

A. Yes; I made that statement; that if the individual manufacturer were attempting to come into Philadelphia and upon a jobbing house on his own production exclusively it would cost him approximately 10% to handle it.

Q. On what do you base your judgment?

A. The fact is deliveries would necessarily be smaller on each order which he takes; for instance if he delivered to John Smith simply the products of the American Tobacco Co. the order might be \$5 worth, the jobber can go to John Smith and get an order for \$25 on the whole line. The cost of delivery of the \$5 order and the cost of delivery of the \$25 order is about the same.

Q. The opinion you gave in that respect was after all your opinion only?

A. Sure; nothing else.

Q. The jobbing business in all lines has been bad for the last two years, has it not, Mr. Eberbach?

A. I am not competent to answer that. I am not familiar with other lines.

223 Q. Have you heard the wholesale grocery business has seen difficult times in the past two years?

A. I don't know anything about it.

Q. Or any other line?

A. I am not familiar with any other lines.

Q. How often do you turn over a stock of cigarettes?

A. What do you mean? How often do we turn our entire stock in a year?

Q. Yes.

A. Oh, I would say probably four or five times.

Q. Is there anything that turns quicker, something that turns quicker than another in your stock?

A. Yes.

Q. Which are the quickest turning articles?

A. That would apply to popular trade-marked merchandise.

Q. Which is the trade-marked merchandise on which you made the quickest turn?

A. All those advertised brands of cigarettes and tobaccos.

Q. How often do you turn your stock of cigarettes and tobacco?

A. I could not answer as to each individual item. I could not tell you how often we turn that.

Q. How do you buy your cigarettes, in what quantities?

A. It depends on the popularity of the brand.

Q. Your most popular brand you purchase in what quantities?

A. Most popular brand in this section—in what quantities do we buy it? What do you mean? You mean what quantities we buy individually or collectively?

Q. In what quantities do you buy the most popular brand of cigarettes sold by your house?

A. Oh, I don't know; we sometimes carry a stock of one brand of four or five million.

224 Q. Do you buy in carload lots?

A. Cigarettes? Very seldom.

Q. How many do you say you have bought at one time?

A. I can't tell you what we have bought at one time; we might buy a million at a time and again 500,000, and we might have several million on hand when we ordered them.

Q. How many cigarettes do you handle in a year, of your most popular make?

A. I could not tell you.

Q. What is the biggest order you have given in the last year's time of your most popular brand of cigarettes?

A. I don't know.

Q. How many cigarettes of the most popular brand do you sell in a year?

A. Do we sell when?

Q. In a year?

A. I don't know. I would have to refer to our records. I don't carry that detail in my head.

Q. So that you can't tell us how fast your turn-over is in your most popular selling cigarette?

A. No; I could not tell you that without going to our records.

Q. You turn over your cigarettes pretty rapidly, however, don't you?

A. Yes.

Q. About once a week?

A. Turn over once a week? No. A brand that we sold 500,000 of in a week we would probably carry three or four million of in stock.

Q. You said on your cross-examination, as I recall it, you thought a fair margin of profit would be 10% off the list price?

A. No; I didn't make that statement.

Q. In what connection did you mean the percentage of 10%?

225 A. I said a fair margin of profit for a jobber to make any money on trade-marked merchandise should receive 10% profit.

Q. You didn't mean to say then that 10% off the list?

A. That he should sell it less 10%—no. I certainly did not.

Q. Mr. Walsh asked you about your visit with Mr. Krull to the American Tobacco Company and I understood you to say on your cross-examination you and Mr. Krull had something to take up with the American Tobacco Company. Did you say that?

A. I don't recollect that I said that. We said so much I don't remember.

Q. What was Mr. Krull's business with the American Tobacco Company on that day?

A. I made the statement that my recollection of the matter was that we went over there to take up the matter of the reports on a deal which they had.

Q. Whose reports on whose deal?

A. Reports from the jobber to the American Tobacco Co. My recollection of it is that they paid the retailer an amount something like 35¢ if he bought so many thousand cigarettes. They sent him a check or something to that effect—some kind of a deal they had on at that time. We reported the sales and allowed him this discount and then the American Tobacco Company paid it back to us.

Q. Why was it necessary for you to accompany Mr. Krull to the American Tobacco Company?

A. Because they owed us something like \$100 or \$200 they had not paid us.

Q. Owed the Krull Company or yourself?

A. Owed us. I don't know how much they owed him.

225 Q. You were not concerned about how much they owed him?

A. We went over on the same errand. These reports were held up. The circular stated they would not be paid to sub-jobbers. We wanted them to tell us who the sub-jobbers were and who they would not pay.

Q. Was it a separate letter to your company and Mr. Krull's Company?

A. Just a general circular.

Q. Addressed to whom?

A. To the jobbing trade of Philadelphia. I do not know whether it extended further than that or not.

Q. Did your association discuss this circular?

A. I could not answer that; possibly they may have discussed it.

Q. Can you give us the reason why you and Mr. Krull went there together on this proposition?

A. I have already stated that. We wanted a definition as to exactly what a sub-jobber was.

Q. Who wanted the definition?

A. We did.

Q. The association?

A. Mr. Krull and myself and when we secured such information we would have imparted it to the rest of the trade.

Q. Through the association?

A. To the rest of the trade.

Q. The rest of the trade were members of the association?

A. Most of them were.

Q. Is that the only subject that was discussed?

A. The only thing I recall. There may have been something else discussed.

Q. At any event you don't remember who you discussed the proposition with?

A. No; I don't remember exactly whom we saw.

227 Cross-examination by Mr. TAULANE:

Q. Mr. Eberbach, so far as your firm was concerned, did the formation of this association and its continuance until it disbanded in any way change or modify the discounts your firm had been allowing the trade on these special articles?

Mr. SMITH. I object, because the minutes of this association are the answer.

Mr. TAULANE. Not so far as this particular firm is concerned.

A. No.

Q. If the business of your firm consisted in the sale of these articles you call "trade-marked articles," selling them at the maximum discount of 8%, would your company make any money?

(Objected to by Mr. Smith.)

The EXAMINER. That is speculative and I rule that out.

Mr. CALDWELL. I object.

Mr. WALSH. I object to the ruling.

(Exceptions noted.)

Mr. CALDWELL. On behalf of the Lorillard Company I renew the motion to strike from the record the letter marked "Exhibit 7" on the ground that it is incompetent and does not tend to prove the allegations of the complaint and is entirely irrelevant to any issue in this proceeding.

228 Mr. SMITH. I want to make an observation on the renewal of this motion; it is entirely too comprehensive and uncertain as to its meaning; that motion has been made three times.

The EXAMINER. It is overruled.

(Exception.)

Mr. CALDWELL. I renew this motion and I want the record to show it because the witness who identified the letter is leaving the stand and there is no proof the letter in any way relates to any of the issues of this proceeding.

(Overruled.)

Mr. CALDWELL. I move to strike out that part of the witness' testimony which was received subject to being connected up and it has not been connected up.

The EXAMINER. The motion is not entertained at this time.

(Adjourned until to-morrow morning at 10.00 a. m. in this room, 318 Post Office Building, Philadelphia, Pa.)

FEDERAL TRADE COMMISSION

VS.

WHOLESALE TOBACCO DEALERS' ASSN. ET AL.

Docket No. 886

PHILADELPHIA, PA., *October 18, 1922.*

Met pursuant to adjournment, 10.00 o'clock a. m.

Before George McCorkle, examiner.

Appearances: Mr. Smith and Mr. Haas for the Federal Trade Commission; Messrs. Taulane, Walsh, and Caldwell for respondents.

230 NELSON S. EBERBACH resumed the stand and further testified as follows:

Redirect examination by Mr. SMITH:

Q. Mr. Eberbach, excluding cigars, what percentage of your total business in tobaccos is represented by the business your company does in tobacco and cigarettes?

A. I could not answer that without referring to the record.

Q. Is it the greater part of your business?

A. Cigarettes and tobacco exclusive of cigars?

Q. Yes.

A. We handle smokers' articles, matches and such things of that character.

Q. I don't want to include those. I am speaking of tobacco, manufacturing tobacco. What percentage of the manufacture of tobacco is manufactured by you exclusive of cigars is represented by the manufactured tobacco and cigars?

A. What percentage of the tobacco product or the entire line?

Q. No; I mean of the entire tobacco line.

A. In Philadelphia or with our house?

Q. With your house.

A. That is a very obtuse question. I don't know how to answer that.

Q. Let me ask it in another way. This resolution passed by the association, as I understand, covers tobacco and cigarettes. That is the wording of the resolution.

A. It covers tobacco and cigarettes, trade-marked brand.

231 Q. What percentage of the tobacco handled by your company is represented by the thing covered by this resolution?

A. You refer to A. B. Cunningham & Company?

Q. Yes.

A. Why, I could guess at that. I could not tell you definitely.

Q. What would be your guess?

A. I would say it probably represented 50 per cent.

Q. 50 per cent of the tobacco you deal in, manufactured tobacco?

A. The way I understand your question is that tobacco and cigarettes—what percentage does tobacco and cigarettes constitute of our volume of business?

Q. No; of your tobacco business. I don't mean tobacco incidentals, such as pipes, cigarette holders, etc. What percentage of the tobacco business was affected by the resolution? I am speaking of tobacco products and not pipes and similar things.

A. That would only be a guess for my answer. I would say 60 or 70 per cent, approximately.

Q. What are the things that you sell in the way of tobacco that were not covered by this resolution?

A. Oh, various brands, some of which we control, and job lots and odd brands of all character and description that are probably not handled by a great many people and a great many of our competitors.

Q. Do you control the manufacture of any cigarettes?

A. No.

Q. What of the things covered by these two resolutions handled by your company or manufactured by the American Tobacco Company?

A. What specified brands you mean?

232 Q. Yes.

A. Well, the American Tobacco Company list approximately, I should say, 130 or 140 brands on their price list. Out of that number, I judge, we handle at least 75 or 80 or thereabouts.

Q. Were all of these things which you handled manufactured by the American Tobacco Company, covered by both of these resolutions?

A. Yes.

Q. Now what are the products manufactured by the Lorillard Tobacco Company, handled by you, that were covered by both resolutions?

A. They also manufacture a multiplicity of brands of which we handle a very large proportion, the exact number I am unable to state.

Q. Were all of the brands manufactured by the Lorillard Company handled by you, covered by both of these resolutions?

A. I would say most of them.

Q. During the period in which either of these resolutions was in effect did your company sell and ship to Bangor, Pennsylvania?

A. I have no recollection. We do not travel in Bangor, Pennsylvania. It might have been possible they applied for quotations from that point, which we naturally would do. We may have made some shipments. We do not travel there, and I do not recall any customer in that section.

Q. Do you remember J. G. Shimer of Bangor?

A. No, I don't recall the name. We may have sold him. I don't know whether we did or not.

Q. Do you remember shipping to A. Haum of 132 North Main Street, in Shenandoah?

A. There is a man up there by the name of Maum, but nobody by the name of Haum.

233 Q. How far is Shenandoah from Philadelphia?

A. Well, I don't know exactly how far it is. I presume in the neighborhood of 50 or 60 miles.

Q. Are there any tobacco jobbers nearer to Shenandoah than the Philadelphia jobbers?

A. Yes; a number of them.

Q. Where are those jobbers located?

A. There are jobbers in Pottsville, Scranton, and Wilkes-Barre.

Q. I show you a carbon copy of a letter and ask you whether that refreshes your recollection as to whether you sold A. Haum, of Shenandoah, Pennsylvania, in 1920?

A. That name should be Naum. I presume we wrote such a letter if it is so signed. I don't recollect the instance.

Q. Do you remember that A. Naum was one of your customers at Shenandoah?

A. Yes; we sell such a man there.

Q. In selling to Mr. Naum at Shenandoah, Pennsylvania, did you sell him at the discount agreed upon by the Philadelphia association; that is, the maximum discount agreed to by the Philadelphia Jobbers' Association?

A. As far as I have any recollection I could not say. I could not verify that without referring to our records.

Q. On these purchases made by Mr. Naum, who paid the freight?

A. I could not tell you that without referring to our records.

Q. Do you remember whether Harry Weiner, of Harrisburg, Pennsylvania, has been a customer of yours?

A. I have no recollection of ever selling such a man; no.

234 Q. Do you remember selling to Herman Shermer, of South Bethlehem, Pennsylvania?

A. We have sold him; yes; off and on for a number of years.

Q. Did you sell him in 1921?

A. I am not sure about that. He was a very infrequent customer of ours, not a regular customer. I could not tell you in 1921 without referring to our records.

Q. When you did sell him, do you remember whether you sold to Mr. Shermer during the life of the Philadelphia Wholesalers' Association?

A. I could not answer definitely without reference to the record.

Q. Is this carbon copy of a letter to Mr. Shermer taken from your files [letter dated September 15th, 1921, to Herman Shermer, South Bethlehem, Pennsylvania, shown to witness]?

A. We probably would have written to him if he asked for a quotation; that was our price.

Q. That is, you would have quoted on September 15th, 1921, the price of \$8 per thousand less 7 per cent?

A. Yes. He was what is known as a subjobber. Both the men you refer to were classed as subjobbers.

Q. Seven per cent was the maximum discount in operation by the resolution of the association?

A. The resolution in question which you refer to did not include anything except Philadelphia and Camden.

Q. Is there anything in the resolution which states it includes nothing but Philadelphia and Camden?

A. That was the general understanding. It was generally so understood. I don't know whether it is so stated or not.

235 Q. Will you answer my previous question as to whether 7 per cent was not the maximum discount in operation by the association in September of 1921?

A. I can't answer that without seeing the minute book. I don't know exactly when that resolution was passed. If you will show me the minute book I can answer it definitely.

Q. I hand you the minute book and ask you to answer that question. Will you tell us please, what this statement in the minutes of December 6, 1920, is?

A. What was that?

Q. This statement in the minutes of December 6, 1920, the minutes of the Wholesale Tobacco Dealers' Association, the statement being as follows: "The committee also made recommendation relative to prices on cigarettes and tobacco. The committee's reports were adopted."

A. You want me to state to you what this means?

Q. Yes. And what was done?

A. What the effect of the adoption of the recommendation was?

Q. The report states at the expiration of any deal which various manufacturers may put into effect that said deal be discontinued by the factories. Will you explain what this following statement means? "The committee also made recommendation as to prices on cigarettes and tobacco. The committee reports were adopted."

A. I don't know what that was.

Q. Isn't that the adoption of the 7 per cent maximum discount?

A. I don't recall what that was at all.

236 Q. Do you recall when the 7 per cent maximum discount went into effect?

A. I do not; unless it is in the minutes there I don't remember it.

Q. Do you know whether it was in effect in September, 1921?

A. I could not tell you definitely when it went into effect; no.

Q. When was it in operation? Can you tell us whether it was in operation in September, 1921?

A. September, 1921, I think it was.

Q. Did you sell to Mr. Herman Shermer, of South Bethlehem, Pennsylvania, in 1921?

A. I could not tell you that. I can't answer it without referring to our records.

Q. Would you mind looking at your records some time before these meetings close so that you will be able to tell us whether you shipped to both of these firms or gentlemen or all of them?

A. When?

Q. In 1921.

A. Yes.

Q. Will you get us that information regarding G. D. Shimmer, of Bangor, Pennsylvania?

A. How is that spelled?

Q. On this copy I have here it is spelled G. D. S-h-i-m-m-e-r, Bangor, Pennsylvania. I notice, Mr. Eberbach, a copy of another letter by Cunningham & Company dated October 21st to Shimmer & Company, Bangor, who may be the same person.

A. I don't think we have any such man. We may have quoted him a price.

Q. Will you also find out whether you sold to Harry Weiner, 1907 Capital Street, Harrisburg, Pa., and the discount allowed him?

A. We never sold him. I recollect that case because he at 237 that time called on us personally and endeavored to make purchases and we refused him credit.

Q. Will you also look up your dealings with Herman Sherner in South Bethlehem, Pennsylvania, in 1921?

A. Yes, sir; we have that.

Re-cross-examination by Mr. CALDWELL:

Q. Mr. Eberbach, yesterday you referred to a representative of the Lorillard Company by the name of Fitzgerald. Will you please tell us what his full name was?

A. John G. Fitzgerald.

Q. Do you know whether or not he is living or dead?

A. He is dead.

Q. Did you attend his funeral?

A. Yes.

Q. About what was the date of his death?

A. Some time in December, 1920, probably about the middle of the month, approximately.

Q. He died here in Philadelphia?

A. He did.

JOSEPH W. WAGNER, having been called as a witness, was duly sworn and examined, and testified as follows:

Direct examination by Mr. SMITH:

Q. Mr. Wagner, where do you live?

A. Just outside of Chestnut Hill, Montgomery County.

Q. Give us the address.

A. Willow Grove Avenue, Laversock, Montgomery County, Pennsylvania. Chestnut Hill, Philadelphia, is my post-office address.

Q. Are you in the wholesale tobacco business?

A. Yes, sir.

Q. With what firm?

A. John Wagner & Son.

238 Q. Are you a partner of the firm?

A. Yes, sir.

Q. Your firm was a member of the Wholesale Tobacco Dealers' Association of Philadelphia?

A. Yes, sir.

Q. I show you two papers which have been marked "Commission's Exhibits Nos. 4 and 5" for identification. Have you seen those papers before?

A. Yes; I have seen those or similar papers.

Q. Where did you first see those papers?

A. I first saw those in the mail.

Q. This envelope, which is known as commission's Exhibit No. 5 for identification—did that come to your firm through the mail?

A. Yes.

Q. Do you know what that envelope contained?

A. I presume it contained this [indicating]. I don't know.

Q. You are referring to Exhibit No. 4 for identification?

A. Yes, sir. I will explain. The investigator came to our office; in the course of conversation asked if ever we received any notice from the Wholesale Tobacco Dealers' Association. I thought we had, but didn't know where it was. My answer was overheard by a rather officious clerk, who happened to have these bits in his desk [referring to Exhibit No. 4]. Whether it came in that—I have not seen it since I opened it three or four weeks previous.

Q. You did see this Exhibit 4 for identification before the occasion when your clerk suggested to you in the presence of the examiner there was some such notice in the office?

A. Some such notice; yes, sir.

239 Mr. SMITH. Mr. Examiner, commission's Exhibit 4 and 5 for identification I now offer in evidence, and ask that Exhibit No. 4 for identification be marked "Commission's Exhibit No. 4" and Exhibit No. 5 for identification be marked "Commission's Exhibit No. 5."

Mr. CALDWELL. Before these are received in evidence I wish to call the examiner's attention to the fact that the envelope, Exhibit 5 for identification, bears the postmark June 18th, 1921, whereas the letter or notice marked "Exhibit 4" for identification bears the stamp June 11, 1921, John Wagner & Sons, so that it would seem perfectly evident that this notice could not have been received in that envelope, Exhibit No. 5, and for that apparent reason I object to their acceptance.

Mr. SMITH. Mr. Examiner, this notice according to this witness was received in the envelope.

Mr. CALDWELL. I object to that statement. The witness has said he did not know whether it was received in the envelope.

Mr. SMITH. I think I ought to be able to conclude a statement without being interrupted by the other side. This notice which is known as commission's Exhibit No. 4 for identification is a notice of a price going into effect on June 20th, 1921, for Philadelphia County and the city of Camden. The envelope is postmarked 240 "Philadelphia, June 18, 1921." So that while this may have on it a stamp of John Wagner & Sons, June 11, 1921, I do not

think it makes any difference. This is offered only for the purpose of showing that notices were sent out.

The EXAMINER. Questions of discrepancies will be subject for discussion later on. I admit the exhibits, and they will be marked as requested.

Cross-examination by Mr. WALSH:

Q. Mr. Wagner, I will show you what is known as commission's Exhibit No. 4 for identification. Did you deliver the sheet attached thereon, indicating prices of tobacco products, to an examiner of the Federal Trade Commission?

A. I did, as I explained just now, through a clerk. A clerk handed it to me and the examiner demanded the paper.

Q. Do you know whether it was received through the mails at your establishment?

A. I told you it was in the envelope; I remember having received a notice to this effect. I would not be able to swear whether it was by mail, but I think it was. I supposed it had been destroyed or lost and not filed, and these two were handed to me in the presence of your examiner by a clerk.

Q. I show you on Exhibit 4 a stamp which reads "John Wagner & Sons, Philadelphia, Pa., June 11, 1921."

A. That is the stamp we use.

241 Q. Would that indicate the time that was received at your establishment?

A. That is our custom; yes, sir.

Q. Then I will ask you to look at Exhibit No. 5 and state what postmark does it bear?

A. June 18, 1921.

Q. Then, Mr. Wagner, I ask you if Exhibit No. 5 was put in the postoffice at Philadelphia on June 18th, could you have received Exhibit No. 4 in that envelope?

A. Evidently not.

Q. I also call your attention to what appears to be on Exhibit 4, a piece of paper pasted with the letter-head of the Wholesale Tobacco and Cigar Dealers' Association of Philadelphia. Do you know who put that on Exhibit 4?

A. I do not know.

Q. You had nothing to do with that?

A. I had nothing to do with that so far as I know.

Q. Then, while you may have handed Exhibit No. 4, enclosed in the envelope which is marked "Exhibit No. 5," to the examiner, still you would say now that apparently Exhibit No. 4 did not come to you in Exhibit 5?

A. I should say so.

Mr. SMITH. I understand those have been admitted.

(Objected to by Mr. Taulane.)

Redirect examination by Mr. SMITH:

Q. You have no personal knowledge of whom you received them?

A. No. I have only a recollection of receiving the notice which I handed to the bookkeeper to follow out in his charges.

942 The EXAMINER. Proceed with the examination.

Mr. SMITH. There is another paper I have here, Mr. Examiner, I would like to have marked "Exhibit 12" for identification.

Q. Mr. Wagner, have you seen this Exhibit 12 for identification before?

A. I may or may not, sir; I have no recollection of it.

Q. Do you remember having given that paper to Mr. Cowie, the examiner for the commission, when he interviewed you?

A. I have no recollection of this paper at all. It may have been given by the clerk.

Q. Do you remember having seen a notice similar to that paper?

A. I can't say I do, although I think we may have made such an allowance.

Q. But as to whether you ever saw this or whether it was received by you you don't know?

A. I could not swear to it because I have no recollection of it.

Q. Do you remember whether on or about June 25th, 1921, you discontinued the allowance of 35 cents per thousand on Turkish cigarettes?

A. I really could not say. We had so little of that sort of business. Q. You had very little Turkish cigarette business?

A. Yes, sir.

Q. That is why you do not recollect about this notice?

A. Yes, sir.

943 Recross-examination by Mr. TAULANE:

Q. Of your own knowledge you don't know who sent them or mailed them?

A. They were not signed. I have no definite knowledge of it; no, sir.

Q. You have no knowledge of it?

A. No absolute knowledge, merely a presumption.

Q. You have no personal knowledge at all?

A. No, sir.

Mr. TAULANE: I object to the admission of these papers.

(Objection overruled.)

Exception allowed.)

DAVID W. LABEL was thereupon called as a witness, and having been duly sworn was examined and testified as follows:

Direct examination by Mr. SMITH:

Q. Mr. Label, where do you live?

A. 649 South 52nd Street, West Philadelphia, Pennsylvania.

Q. What is your business, Mr. Label?

A. Retail cigars, cigarettes, and tobacco.

Q. How long have you been in that business?

A. Six or seven years.

Q. In Philadelphia?

A. Yes, sir.

Q. Where is your store?

A. Northwest corner 15th and Arch Streets, Philadelphia. That is the main store. I have other stores.

244 Q. Where have you purchased the tobacco and cigarettes you have handled in your retail store in the last several years? From manufacturers or from jobbers?

A. From the jobbers.

Q. Philadelphia jobbers or jobbers outside of Philadelphia?

A. I did purchase from one outside of Philadelphia.

Q. In 1921 what jobbers were you purchasing from?

A. I think my business chiefly was being done with the Franklin Tobacco Company of Philadelphia. I think I did purchase quite a lot of merchandise from Quell of Philadelphia, and I also used to give Murphy Brothers in Camden some business.

Q. State whether in 1920 there was any difference in the prices allowed you by these wholesalers you have named?

A. You mean whether there was any difference between the prices from one jobber to the other?

Q. Or one jobber allow you better discount than the other jobber?

A. At times they did.

By Mr. CALDWELL:

Q. You are referring to 1920?

A. I think so.

By Mr. SMITH:

Q. Do you remember the organization of the wholesalers' association?

A. I had knowledge of it being formed; yes, sir.

245 MR. WALSH. I move to strike out the answer of the witness that he had knowledge of the association being formed. The answer is a conclusion and not based on any statement of facts by the witness.

(Motion overruled.

Exception.)

Q. Where did you get your information that there had been an association formed?

A. It was the general talk in the city among the trade. We never got any written or printed notice.

Q. Did you ever get any information from any of the jobbers that there was an association formed?

A. Yes.

Q. At the time?

A. Yes, or about the time.

Q. Not in writing?

A. No, sir.

Q. Did you get it without getting it in writing?

A. I was told that there was an organization being formed, and that the prices were changed.

Mr. CALDWELL. I move to strike that out. He is trying to draw a conclusion.

(Motion overruled.

Exception.)

Q. Who told you, Mr. Label, that there was going to be or had been an association of jobbers?

A. I can't say offhand. It was one of them.

Q. Of whom?

A. Of the jobbers.

Q. One of the jobbers told you an association of the jobbers had been formed or was about forming?

A. Yes, sir.

246 Q. What other information did you get from the jobber whose name you can't recall?

(Objected to by Mr. Caldwell as incompetent and as hearsay.

Objection overruled.

Exception.)

Q. (Question repeated.) What other information did you get from the jobber whose name you can't recall?

A. You see I was doing business at the time with two or three people. I can't say which one was the one who informed me of the fact.

Q. We are trying to get from you the information you got from this man without naming him?

A. The only thing I was told on and after a certain date there would be a change in the discount.

Q. Did the change in discount take place?

A. Yes, sir.

Q. What was the change in discount?

A. Anywhere from 3 to 4 per cent.

Q. What do you mean by that?

A. Prior to the organization we were able to buy at times less 10 per cent from the list. Other times 10 and 1. And when this thing was formulated the best we could get was 7 and 8.

Mr. WALSH. I move to strike out the answer.

(Motion overruled.)

Mr. CALDWELL. I move to strike out because it refers to no one but this witness.

247 The EXAMINER. Let the witness explain what he means by "we."

A. I mean myself.

Q. Were you able to buy when the discount was made 8 per cent any better from Krull than you were from the Franklin Tobacco Company?

(Objected to because it calls for a conclusion.)

(Objection overruled.)

A. No.

Q. Was there any difference in the discounts allowed you by Krull and the Franklin Tobacco Company after you heard there was an association of tobacco wholesalers?

A. No, sir.

Q. Was there any difference between the discounts allowed you by these two companies and any other jobber in Philadelphia?

A. No, sir.

Q. Did you try to buy from jobbers other than Krull and the Franklin Tobacco Company and Murphy Brothers in Philadelphia?

A. When?

Q. After the organization of the jobbers took place.

A. No, sir.

Q. These three are the only ones you endeavored to purchase from—Krull, Franklin Tobacco Company, and Murphy Bros.?

A. Do you mean after the association was formed?

Q. Yes, sir.

A. I didn't buy anything from these three.

Q. Why didn't you buy from these three?

248 A. I felt as long as the prices would be the same I might as well deal with somebody I preferred.

Q. Whom did you prefer to deal with?

A. E. Cohn & Son.

Q. Where are they located?

A. 512 South 2nd Street, Philadelphia.

Q. Are they wholesalers?

A. Yes, sir.

Q. Was there any difference between the discount allowed you by Cohn & Sons and the discount offered to be allowed to by the Franklin Tobacco Company, Krull, and Murphy Brothers?

A. Let me answer that in this way, that the other jobbers in Philadelphia didn't get a chance to offer me a better price because of the understanding that I had in my own mind that the prices would be the same, and since they were the same I didn't try to buy anything off other people.

Q. Did you find out the prices of Krull and Franklin and Murphy were the same?

(Objected to.) Let us see what he did and the court will say whether he found out.

The EXAMINER. The witness can tell what he did.

A. I never called the other people up to get a price from them after that?

Q. How did you know their discount?

A. I knew that was a general thing throughout the city.

Q. How did you know it? Did the salesmen come in your store?

249 Mr. CALDWELL. I object to the witness being led.

The EXAMINER. Go ahead, Mr. Witness, and tell what you know about it.

A. I am trying to. I can't tell anything more than what I have said. I never called these people up to tell me what their present prices were after the association went into effect, because I understood that was the price. And since that was the price with them all, I preferred to give the business to a fellow I knew better than the other fellows.

Q. Where did you get the understanding they were all going to have the same price? From the jobbers you got the information about the association being formed?

(Objected to as leading.)

Q. Where did you get the understanding or information that the prices of all the Philadelphia jobbers would be the same?

(Objected to by Mr. Caldwell on the ground that the witness' mind has been led by the question immediately preceding, and therefore this question is improper.)

The EXAMINER. He has already said he got the information from some jobber about the association. Proceed to answer that question, Mr. Witness.

A. It was a common thing—it was known——

250 The EXAMINER. We are not asking for the common thing. Tell where you got it, if you know?

A. I can't say directly off so and so because it seems to be the understanding.

Cross-examination by Mr. WALSH:

Q. What kind of business do you run?

A. Cigars, cigarettes, tobacco.

Q. Retail?

A. Yes, sir.

Q. Strictly a retail business?

A. Strictly so.

Q. How long have you been in the business?

A. Six or seven years.

Q. At the same location?

A. No.

Q. Not in the same location?

A. I have been about six years at 15th and Arch Streets.

Q. In the years gone by who have you bought your cigarettes from?

A. You mean the jobbers I have bought from?

Q. Yes.

A. E. Cohn & Son, Franklin Tobacco Company, Charles A. Krull, and Murphy Brothers of Camden.

Q. You heard there was going to be an association formed?

A. Yes.

Q. Do you know when that was?

A. Sometime prior to October 4th of 1920, because that day the new prices went into effect.

Mr. CALDWELL. I move to strike out the voluntary statement of the witness "because that day the new prices went into effect."

(Motion overruled.)

(Exception.)

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By Mr. WALSH:

Q. What new prices went into effect?

A. The 7 and 8 per cent discount.

Q. You were at that time buying from Krull, Cohen, and from Franklin?

A. Yes.

Q. What prices were you getting?

A. Less 10 per cent from the list.

Q. Did you continue to buy from these three jobbers?

A. What do you mean, all the time?

Q. Yes; from that time on?

A. From that time on?

Q. Yes; afterwards?

A. No.

Q. Who did you quit buying from?

A. All of them outside of him.

Q. Who?

A. Outside of Cohen.

Q. Did Cohen change his price on you?

A. Yes.

Q. From what?

A. From 10 to 7 and 8, on tobacco.

Q. Did you get any quotations at all from Krull or the Franklin or Murphy?

A. No, sir.

Q. You got no quotations at all?

A. No, sir.

Q. You simply quit doing business with them?

A. Yes, sir.

Q. They didn't tell you what the price was?

A. No.

Q. They didn't quote any price at all?

A. No.

Q. So that there was no change at any time of 4 per cent so far as your business was concerned?

A. I don't get you.

Q. You said the prices changed 3 or 4 per cent?

A. Yes.

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Q. When was their change of 4 per cent to you?

A. From October 4th on.

Q. When did you pay 4 per cent?

A. I said 3 to 4 per cent.

Q. If you said 4 per cent you were mistaken?

A. No, sir. I said from 3 to 4 per cent.

Q. And you say now 3 to 4?

A. I said it then.

Q. And you say it now?

A. Yes, sir.

Q. When were your discounts changed to the extent of 4 per cent, and by whom?

A. October 4th.

Q. Who changed the discounts allowed to you of 4 per cent? What jobber made a difference in that price to you of 4 per cent on the goods you bought?

A. Why E. Cohen & Son, from then on.

Q. Changed from what figure?

A. From 10. Other times we could get 10 and 1.

Q. You say at the time the association was formed you were getting 10 per cent off the list price?

A. Yes.

Q. Did Cohen & Son ever charge you 6 per cent off?

A. I said from 3 to 4 per cent.

Q. If they charged you 6 per cent that would be 4 off?

A. Seven was what I was getting.

Q. Have you any invoices of the purchases you made from these jobbers in this period?

A. No.

Q. You are only testifying from memory; that is true, isn't it?

A. Yes, sir.

Q. Did you know you were to be subpoenaed here about prices?

A. I got a subpoena Monday.

253 Q. Did you look up your invoices to ascertain the prices you paid for these goods for the periods about which you have testified?

A. No.

Q. You may not be entirely correct?

A. I am pretty sure of it. That's my business, you know, and I am pretty near sure what I pay for the stuff.

Q. Did you keep books of account of what you did pay?

A. Yes.

Q. Why didn't you look in your accounts to see what you paid? That would be the best method.

A. Well, it might be the best legal method.

Q. You never got a quotation afterwards from either Krull or the Franklin Company?

A. No.

Q. So far as your own personal knowledge is concerned, you don't know what prices they were charging their customers?

A. No.

Q. Nor what prices the Murphy Brothers were charging?

A. Not to my personal knowledge; no.

By Mr. CALDWELL:

Q. Before October 4th, 1920, you are speaking about?

A. 1920, I think; the year the association was formed.

Q. Was it October 4th, 1920 or 1921, you are speaking about?

A. Let me see—1921 that would be.

Q. 1921?

A. When the association was put into effect.

254 Q. The time you are talking about—about the change in the discount?

A. Yes.

Q. What is your best recollection—was that October, 1921?

A. I could not say that unless I looked back on the bill—I am not sure.

Q. Then you don't know when these changes in discount occurred?

A. I don't recollect now whether it was last year or the year before.

Q. At the same time that you were buying from Krull, from the Franklin Company, and from Murphy Brothers, you were not buying from Cohen, were you?

A. Yes; I was some.

Q. Take back in 1917, did you buy anything from Cohen?

A. They were the first people I ever did business with in Philadelphia.

Q. When did you go into business?

A. About 6 or 7 years ago.

Q. How long did you deal with Cohen after you started in business with Cohen?

A. I never quit dealing with him, but I didn't give him all my business.

Q. In 1919 what discount did you get from Cohen?

A. That I could not say without looking up my bill.

Q. In 1919 what discount did you get from the Franklin?

A. I don't believe I dealt with them then.

Q. In 1919 what discount did you get from Murphy Brothers?

A. I don't remember.

Q. In 1919 what discount did you get from Krull?

A. I could not say now.

Q. Can you say in 1920?

A. Do you mean prior?

255 Q. No; I don't mean anything prior—I am asking you in 1920 what discount did you get from Krull?

A. I can't answer that.

Q. What did you get from the Franklin people?

A. The same answer would apply to the four of them.

Q. So that anything you heretofore said is now changed by the question and answer?

(Objected to because it is too general.)

A. No.

Q. I will withdraw that question. Which are you dealing with now?

A. Some with Cohen and some with Franklin.

Q. How long have you been dealing with the Franklin?

A. Lately?

Q. Yes.

A. The last month or so.

Q. Are you dealing any with Krull now?

A. No, sir.

Q. None with Murphy Brothers now?

A. No, sir.

Q. What was your maximum discount you got from Krull after the association was formed?

A. 7 and 8 on cigarettes and tobacco.

Q. Never got anything less?

A. No.

Q. And how long did it remain 7—is it 7 now?

A. No, sir.

Q. What it is now?

A. Any price.

Q. What was it the first of the year?

A. Any price.

Q. What do you mean by "any price"?

A. One man will sell you less 10 and another man 10 and 1.

256 Q. Was that the price last January?

A. That is the same price to-day.

Q. January, 1922?

A. Yes; the same price now, less 10 and better.

Q. What did you buy these articles for January, 1922?

A. Less 10 or better.

Q. What in December of 1921?

A. That I would have to look up.

Q. When did you first get the maximum discount of 10 per cent after the association was formed—what month?

A. I can't answer that either. I don't know whether it has been four months, six months, or eight months.

Q. Isn't it a fact for the last year you have been getting better than 10 per cent—the last twelve months?

A. I don't know. I could not say off hand. I could not tell you off hand, but I could tell you if I had my bill.

Q. Isn't it a fact ever since this association was started the discounts varied from time to time?

Mr. SMITH. I object to this question because it covers a period during which the association has not been in existence.

The EXAMINER. I think if the witness understands the question he can answer it.

Q. What is your best recollection?

A. As far back as this year anyway, 1922.

257 Q. How about 1921?

A. It may have been the latter part of 1921.

Q. That you started to get 10 off?

A. Yes, sir.

Q. Who were you buying from then?

A. E. Cohen & Son.

Q. And you may have been getting 8 or 9 per cent during the last twelve months?

A. I don't think it is that long.

Q. How long back?

A. I can only go back this year.

Q. Did you buy from anybody else besides E. Cohen in 1921?

A. I can't say that.

Q. When did you start to buy from Franklin?

A. Just lately—within the last month.

Q. What did you say you are getting to-day?

A. 10 per cent.

Q. From both of them?

A. Yes, sir.

By Mr. SMITH:

Q. Immediately prior to the time when you learned or heard that the jobbers were going to allow the same discount—immediately prior to that time what had been the best discount allowed you by any of your jobbers?

(Objected to on the ground he assumes he heard all these jobbers were going to do this.

Objection overruled.)

258 A. 10 and 1.

Q. Is that why you said on your examination that when the maximum discount was made 7 per cent it made a difference of 4 per cent in your discount?

A. 3 and 4, yes.

Q. You said on your examination that the maximum discount allowed you was 8 and 7. Did you get 8 one time and 7 another?

A. 7 on cigarettes and 8 on tobacco.

(Objected to.

Objection overruled.)

Q. Was there any time up to the latter part of 1921 when that rate of discount allowed you by Cohen changed or did it always remain the same in that period?

A. It remained the same for quite a while. I could tell that better if I looked at my invoices.

Q. Did it change at any time in the period when you learned that there was an association, up to the latter part of 1921?

A. No, sir.

Cross-examination by Mr. TAULANE:

Q. Is E. Cohen a member of the association?

A. As far as I know he was.

259 LOUIS T. COWIE was then called as a witness, and having been duly sworn and examined, testified as follows:

Direct examination by Mr. SMITH:

Q. Where do you live?

A. In Washington City, 1215 K Street, Washington, D. C.

Q. In September, 1921, what was your occupation?

A. I was an attorney and examiner of the Federal Trade Commission.

Q. How long prior to September, 1921, had you been an examiner of the Federal Trade Commission?

A. I first went with the commission in July, 1917. I resigned in August, 1919, and went back with them in March, 1920.

Q. When did your connection with the commission cease after 1920?

A. It ceased March 27th, 1922.

Q. What is your business address at the present time in Washington or your home address?

A. 1215 K Street Northwest.

Q. Did you in the course of your duties as an examiner of the Federal Trade Commission interview the wholesale tobacco dealers of Philadelphia in 1921?

A. I did.

Q. Do you know Mr. Wagner, of Wagner Brothers, who testified here this morning?

A. I could not swear to him in person. I remember interviewing the gentleman.

Q. I show you commission's Exhibit No. 12 for identification and ask you whether you have seen that paper before?

A. I remember seeing it; yes, sir.

Q. Where did you first see that paper?

A. I can not answer from recollection, but if this is an exhibit which was put in my record I saw it at the place of business of the party whom I interviewed.

Q. Did you ever interview Mr. Harvey D. Narrigan, of Philadelphia?

A. I did.

Q. For what purpose?

A. For the purpose of ascertaining the facts in regard to the wholesale jobbers' association.

Q. Was that done by you in pursuance of your duties as examiner of the commission?

A. Yes, sir.

Q. Do you remember the date of your interview with Mr. Narrigan?

A. I do not. I think it was in September of 1921.

Q. Do you know where you interviewed Mr. Narrigan?

A. At his store.

Q. In Philadelphia?

A. Yes, sir.

Q. Do you know the name of the firm that Mr. Narrigan was connected with?

A. H. D. Narrigan & Son.

Q. H. D. Narrigan & Company?

A. I think it was.

Q. Can you tell us what was told to Mr. Narrigan by you or what Mr. Narrigan told you at this interview at his store in September of 1921?

A. Not off-hand from recollection. I did not attempt to charge my memory with the interview.

261 Q. After your interview with Mr. Narrigan, what did you do with respect to that interview?

A. I made notes at the time of the interview and later on, possibly within the same day or a few days afterwards, dictated those notes and in the shape of a report filed it with the commission.

Q. I show you four typewritten sheets of paper and ask you whether that is the copy of the report of your interview with Mr. Narrigan?

A. It is.

Q. Does this report which I just show you and which you now have in your hands refresh your recollection as to the interview you had with Mr. Narrigan on September 27th, 1921, at his store in Philadelphia?

A. It will when I read it through.

Q. Will you read it, please?

(Witness peruses the report.)

Q. Has the reading of this report of the interview with Mr. Narrigan refreshed your recollection as to what he said to you at that interview?

A. Yes, sir; to a certain extent.

Q. Will you tell us what you said to Mr. Narrigan and what he said to you on that interview?

Mr. CALDWELL. I object to that on the ground it is not binding on the Lorillard Tobacco Company in any way, shape, or form. It is irrelevant and immaterial as to this witness, and it is hearsay
262 and should not be received against the Lorillard Tobacco Company.

(Same objection on behalf of the American Tobacco Company.

Same objection by Mr. Taulane on behalf of other respondents.)

Mr. CALDWELL. I object to the question on the ground that it is a wholesale question. He should not be permitted to ask what the interview was, but he should be required to ask some specific question to which we can intelligently make objections.

The EXAMINER. Mr. Smith, what is your question?

Mr. SMITH. What did Mr. Narrigan say to you on the occasion of this interview? That is the question. Which means the interview had September 27th, 1921.

The EXAMINER. We will let the witness proceed, and if he states something you wish to object to, you can object at that time.

Mr. TAULANE. I object on the further ground that this was written two or three days afterwards; that he took it from his original

notes; those original notes are not presented. It seems to me the document itself is not admissible and he can't use it without the production of his original notes.

The EXAMINER. The objection is overruled.

(Exception.)

263 Mr. TAULANE. I object to it on the further ground that the statement made by a respondent in the proceeding can be no evidence whatever against other respondents.

The EXAMINER. Objection overruled.

(Exception.)

The EXAMINER. If you desire me to take the paper and look over it and say whether I think it is relevant or not, I will do so.

Mr. TAULANE. I wish you would.

The EXAMINER. I have not read the paper over, but I am not going to pass on anything until the witness testifies. Proceed, gentlemen.

The WITNESS. Shall I state generally from this paper what was said by the witness.

Mr. SMITH. Tell us, using this paper to refresh your recollection, what Mr. Narrigan told you during the course of this interview on September 27, 1921.

Mr. CALDWELL. Same objection.

(Same ruling.)

The WITNESS. Mr. Narrigan stated in substance as follows. I think it is just as well to read this just exactly as it is.

Mr. CALDWELL. I object to the witness reading this statement on the ground that the witness is not permitted to take the paper and
264 read therefrom. He is only able to testify from his refreshed recollection, if his recollection is refreshed. If Mr. Narrigan was being examined, questions would be asked and opportunity would be given to object.

The EXAMINER. I rule the suggestion is proper. That Mr. Cowie should refresh his recollection from the paper. I don't think it is proper for him to read from the paper. Let him refresh his recollection from the paper and state what his recollection is.

The WITNESS. Well, I could not tell you off hand from reading this paper the total substance of my interview.

The EXAMINER. We are not asking you for the total substance of your interview. We are asking you as you go along and as it comes to your mind state what was said at that interview?

A. Well, I interviewed him at his place of business. He told me that he was the sole owner of the business. That he has been in business since 1875.

Mr. CALDWELL. I ask the witness whether he really remembers that or whether he is stating that because he has seen it in the paper.

(Objection overruled.)

The EXAMINER. Go ahead with your testimony.

265 The WITNESS. He said they were in the wholesale jobbing tobacco business and handled cigars, tobacco, and cigarettes.

He told me the average amount of their business was about \$400,000 for the year 1920. He also told me that their business had increased very considerably during the past year—about 50 per cent. He told me they bought their cigars from manufacturers in Pennsylvania and their Manila goods from New York brokers.

Mr. CALDWELL. Mr. Examiner, it is perfectly evident that the witness is from time to time looking at the typewritten sheets that are before him and then making his answers. I think it is perfectly pertinent, and I would like to insist that I should object here to this witness testifying unless he stated that his recollection has been refreshed by this paper and that he is testifying from his recollection and not from this paper.

The EXAMINER. I think I made myself clear. He has a right to look at that paper, and the very second he takes his eyes off it to testify.

Mr. CALDWELL. May I ask this witness this question? Mr. Cowie, I ask you whether after you read this paper sentence by sentence, are you really and truthfully and in fact under your oath testifying from the paper and not from your refreshed recollection? Which is it?

266 The WITNESS. I am testifying from recollection refreshed by what I see on the paper.

The EXAMINER. Go ahead, Mr. Witness.

A. He stated they bought their cigarettes and cigars from the American Company, the Lorillard Company, Laggett & Myers, and other large manufacturers.

He stated that the general discount allowed them was 10 per cent plus 2 per cent for cash in 10 days.

He also stated that the prices of these firms for standard articles was about the same.

He stated that about 99 per cent of their sales were to retail dealers in Philadelphia and Camden.

He said they formerly allowed as high as 10 per cent discount to large dealers, as they were compelled to do so by competition.

By Mr. SMITH:

Q. Mr. Cowie, you said he said "they" formerly allowed a certain discount. Who do you mean by "they"?

A. Narrigan & Company had formerly allowed 10 per cent discount because of the keen competition.

He stated that 7 per cent was the maximum discount which they allowed at the time of the interview.

He stated that the Wholesale Tobacco & Cigar Dealers' Association in Philadelphia was formed in 1920 to better conditions in the
267 tobacco business. That in September, 1920, the association passed a resolution to the effect that the maximum discount should be 8 per cent regardless of the quantity sold to any one dealer.

He said that some of the members had been allowing as high as 10 per cent plus 2 per cent, which was selling the goods at the same price as they paid for them.

He said that 8 per cent was the highest discount that could be allowed by any member of the association and at the same time stated that there was no penalty of any kind attached to the violation of that resolution or order.

He stated that an investigator was appointed by the association to ascertain from what point goods were being shipped to Philadelphia and sold at better prices—that is lower prices—than those fixed by the jobbers generally in Philadelphia.

He said that this investigator found two or three instances in which goods were being shipped from New York and also from Camden I believe and Chester, Pennsylvania, and sold here at lower prices than those usually charged by the jobbers.

He stated that he was informed that a member of the association, Murphy Brothers, of Camden, had been giving better prices than those fixed by the association, and that at a meeting of the association when they were accused of it there was quite a general row and they quit the association.

268 By Mr. SMITH:

Q. That is, Murphy Brothers quit the association?

A. Yes; Murphy Brothers quit the association.

And that they, Murphy Brothers, later said all the other members of the association were doing the same thing that they were.

He told me he didn't remember the name of the investigator who had been appointed by the association to make the investigation.

He said that his firm had received notice from the association of a change in the price of the Beechnut cigarettes to \$5.70 per thousand.

That this was lower than the discount on all the other brands of cigarettes.

That a representative of the Lorillard had—

Mr. CALDWELL. I object to this witness proceeding to state anything Mr. Narrigan said to this witness relative to anything that was stated to Narrigan by somebody else purporting to be the representative of the Lorillard Company until it is shown who the representative was and that that person was a representative of the Lorillard Company.

Mr. SMITH. No matter what this witness says, it is perfectly proper for him to tell it, because he is telling of the interview he had with Mr. Narrigan. It may be that what Mr. Narrigan told him with respect to the Lorillard Company was not the truth, but it doesn't necessarily follow this witness is not to testify to the interview and all of the interview for what it may be worth.

The EXAMINER. At this point we will adjourn until 2.15 p. m.

Meeting adjourned to 2.15 this afternoon.

PHILADELPHIA, PA., *Tuesday, Oct. 18, 1922.*

Met pursuant to adjournment at 2 p. m.

Before George McCorkle, examiner.

Mr. Smith and Mr. Haas for the commission; Messrs. Caldwell, Walsh, and Taulane for the respondent.

LOUIS T. COWIE resumed the stand and further testifies as follows:

Direct examination (continued):

The EXAMINER. Gentlemen, this matter to which objection was made by attorney for the Lorillard Company is admitted against Narrigan only and it in no way should be received in the evidence against the Lorillard Company or any part of it.

270 Mr. TAULANE. I object on the ground that it is not evidence against the other respondent.

(Objection overruled.

Exception.)

By Mr. SMITH:

Q. Mr. Cowie, will you proceed and testify as to the interview?

A. He stated a representative of the Lorillard Company had called on them and asked them why there was not a better sale for the Beechnut cigarettes, and he said that he had told him because the price was too high.

Mr. SMITH. Who said that?

A. Mr. Narrigan said he told Lorillard's representative the reason there was not a better sale was because the price was too high. The representative asked him then if they made a price if the association would notify its members of that fact and he said he told him it would and he stated that he as vice president, in the absence of the president, and those are the members of the association—I don't remember whether he said of a better price or not. I don't think that was said at all—that they had offered a better price. He also stated that later the Lorillard had discontinued a discount of certain cigarettes—a discount of 35 per cent which they had been
271 allowing on Turkish cigarettes—and that the members of the association were notified of that fact.

Q. Did Mr. Narrigan say how the members of the association were notified?

A. By the secretary.

Q. By the secretary of the association?

A. Yes, sir.

Mr. TAULANE. Objected to on the same ground.

(Objection overruled.

Exception.)

A. Mr. Narrigan also stated that all of the members of the association were presumed to live up to the agreement fixing the maximum discount of 8 per cent and later at 7 per cent, and he also stated that his firm had strictly lived up to these prices and had not allowed any better discount.

He further stated that the Wholesale Tobacco Jobbers' Association had instructed the president, Mr. Eberbach—

Mr. TAULANE. I object to this on behalf of Mr. Eberbach and other defendants as a statement made in the absence of the defendants and not binding on them, because this person, Mr. Narrigan made a statement in the absence of these persons.

Mr. SMITH. I want to answer that it has been shown by this record that Mr. Narrigan was the vice president of the association at 272 different times according to the minutes of the association, acted as its presiding officer in the absence of the president, Mr. Eberbach. The members of this association were joined together in a common enterprise which was unlawful. They were partners in that enterprise; this gentleman, Mr. Narrigan, being an officer of the association, being one of its executive officers, could bind all his other partners in this unlawful agreement in making admissions and declarations regarding activities of the association.

Mr. TAULANE. I put my objection that the ordinary rule of law is that no person can make a statement about a statement in that person's absence whereby it becomes evidence. There is a second proposition that where a number of persons who are charged with a conspiracy do an act and one makes a statement pursuant to or the carrying out of the conspiracy, then it is admissible, but when a person makes a statement that has absolutely nothing to do with the carrying out or furthering of the conspiracy, that has nothing to do with it.

The EXAMINER. I will admit this, as it was in furtherance and in corroboration of the alleged combination on the part of the association.

Mr. CALDWELL. I ask that the same ruling apply to the Lorillard as heretofore.

273 The EXAMINER. Same ruling I made heretofore as to the Lorillard Company will obtain.

(Same objection interposed on the record for the American Tobacco Company.

Exception for American Tobacco Company.)

The WITNESS. He stated that the jobbers' association had instructed Mr. Eberbach, its president, to call upon the American Tobacco Company and the Lorillard Company and request them to assist the association in maintaining the prices or the account fixed by the association. Mr. Eberbach did so, and later reported to the association that both of these companies had agreed to do so.

Mr. CALDWELL. I move to strike out this also on the ground that it calls for a conclusion and is incompetent and hearsay and against the Lorillard Company.

Mr. WALSH. I move to strike it out because there is no testimony tending in any way to involve the American Tobacco Company in any alleged conspiracy; that it is hearsay evidence.

Mr. TAULANE. I also move to strike it out on the same ground, and on the further ground that it is a mere voluntary declaration made

by a person affecting the other respondents when these respondents were not present and had nothing to do with the actual doings or workings of the association.

274 Mr. SMITH. There seems to be three objections here and three grounds upon which the motion to strike is based. One is hearsay as I understand it, the other a conclusion, and the other is that it is not binding upon the others. And an analysis of this statement shows it is not hearsay; because it binds Mr. Narrigan, it binds the association; it is not a statement of a conclusion, but it is a statement of fact. It is binding upon the members of this association and upon Mr. Narrigan. The motion to strike should not be granted.

The EXAMINER. The answer is permitted to stand with the understanding that it is not evidence against the American Tobacco Company or the Lorillard Company.

(Exception for Mr. Smith.)

Mr. TAULANE. Do I understand it is evidence against Mr. Eberbach?

The EXAMINER. I made the ruling.

(Exception for Mr. Taulane.)

The WITNESS. He stated that later on his firm received copies of printed letters from the American Tobacco Company and the Lorillard Company—

Mr. CALDWELL. I object to this statement on the ground that the letters themselves are the best evidence and that the Lorillard Company should not in any wise be bound by this statement.

275 Mr. SMITH. This is merely a statement of what was told him.

The EXAMINER. It is not evidence against the Lorillard Company.

The WITNESS. Addressed to the trade, in which they requested jobbers to sell their goods at a fair profit, and that they would not consider any jobbers who sold at less or below those prices as desirable customers.

By Mr. SMITH:

Q. Now, Mr. Cowie, have you given us this entire interview you had with Mr. Narrigan on this occasion?

A. No; I had a further interview.

Q. On this occasion?

A. At that time I had a further interview with him, but it was upon another question and another complaint that had been made to the commission with regard to the tobacco trade.

Q. Did that interview have anything to do with the sale of the tobacco by the jobbers' association or by the jobbers?

A. Well, I think it had something to do with them, but it was in regard to a charge made against the Liggett stores and the United Cigar Company.

Q. On retail selling?

A. On retail selling.

Q. How soon after the interview which you had with Mr. Narrigan on September 27, 1921, did you reduce your notes of that interview to the form of a report?

A. Within a few days, I think.

276 Q. What had become of the notes as you made on that interview at the time you were interviewing Mr. Narrigan?

A. Well, after dictating to the stenographer I frequently destroyed my notes and sometimes I retained them and took them back to the office with me, but all of the notes which I had at the office together with some other memoranda I left in my desk in New York City when I went to Washington, and Mr. Shinn, in charge, thinking I did not need them any more, destroyed them.

Q. When were they destroyed Mr. Cowie?

A. I think some time last March.

Q. What was the paper from which you refreshed your recollection after the interview you had with Mr. Narrigan on September 27th, 1921?

A. It is my report to the commission after that interview.

Q. Did you see Mr. Narrigan at any time after the 27th day of September, 1921?

A. As to seeing him in person I am not sure. But I did call at their office under instructions from Mr. Shinn, my superior in New York, and left a copy of this report there. I think I left it with Mr. Narrigan in person—I am not sure—with the instruction that he should read it carefully and if there were any mistakes or any corrections he desired to make, that he should call the matter to the attention of Mr. Shinn.

Q. Who is Mr. Shinn?

A. Mr. Shinn is the attorney and examiner in charge in the New York office under which I work—B. S. Shinn.

277 Q. Did you give Mr. Narrigan, or in case you didn't give the copy of the report to Mr. Narrigan, did you give to that party Mr. Shinn's address in New York?

A. I did.

Cross-examination by Mr. TAULANE:

Q. Where did you interview Mr. Narrigan?

A. At the store on 6th Street.

Q. His store?

A. Yes.

Q. You were present, you and he?

A. Well, I wouldn't say there was any other person present. I didn't attempt to charge my memory with the details of all the investigations which I made or the answers, further than to bear them in mind so as to make a correct report of the same.

Q. You won't say somebody else wasn't there?

A. No; I think there was.

Q. Listening to what he said and what you said?

A. I think so.

Q. You don't know who that person was?

A. No.

Q. And you told him who you were?

A. Sure.

Q. You told him what?

A. I showed him my credentials.

Q. And your credentials were to the effect that you were an investigator for the Federal Trade Commission?

A. Yes.

Q. And these conversations he had with you were given to you pursuant to your request for information?

A. Yes, sir.

278 Q. What became of those notes you took?

A. I told Mr. Smith I sometimes destroyed my notes. It was simply a pencil memorandum in longhand. Sometimes I got down verbatim what they said, sometimes I didn't but as nearly as I could in narrative form.

Q. You were not attempting at that time to buy cigars or tobacco?

A. Not much.

Q. You were not there for that purpose?

A. Not much.

Q. You were not there in any effort to get them to do anything along the lines of those resolutions?

A. Most assuredly not.

Q. Do you say you left with him a copy of that paper?

A. I left a copy of that paper.

Q. You didn't leave it with him in person?

A. That I am not certain of.

Q. Isn't it a fact you did not?

A. No; it is not a fact.

Q. With whom did you leave it?

A. I left it at the store, left a memorandum with Mr. Shinn's address.

Q. With whom did you leave it?

A. I certainly left it with some person connected with the firm.

Q. Did you ever get it back approved?

A. No, sir.

Q. Did you see Mr. Narrigan after that?

A. I don't remember whether I did or not.

Q. Did you depend on your memory for some of these things you put down?

A. No; if I put them down I didn't.

279 Q. You depended partly on your memory and partly on your notes. Don't you put in some things afterwards?

A. I enlarged upon my notes, of course.

Q. You enlarged upon your notes?

A. Yes, sir.

Q. How many days elapsed from your interview — the actual dictating to the stenographer?

A. I don't know. It may have been the same day in that case or it may have been two or three days. Ordinarily it was within two or three days.

Q. That is the maximum?

A. Yes; only two or three days. Usually the next day.

Q. But as to this particular statement you can't tell how much of that statement was founded on your notes or how much was founded on your memory?

A. No; I can't. I took down the substantial things.

Q. But you have not the notes here to show us?

A. No.

Q. And you were taking a good many other statements at that time?

A. Yes.

Q. Did you take any other statements, the day you took Mr. Narrigan's?

A. I did.

Q. How many?

A. I don't remember whether two or three. I usually took two or three a day and sometimes took one day to take one; sometimes took more than one day to take one.

Q. When you dictated to the stenographer, how soon after that did you get the notes transcribed to go over them?

A. Usually the next day.

280 Q. Then what did you do with them?

A. Forward them to New York to Mr. Shinn.

Q. How soon after that did you get them back?

A. I wouldn't get them back.

Q. Who did you dictate them to?

A. Miss Alice Bradley, stenographer here in Philadelphia.

Q. She gave them back to you how soon?

A. Usually the next day.

Q. How many copies do you have made?

A. Usually three.

Q. Of course if you didn't take anything down in your notes and you depended on your memory there may have been some errors crept into that statement?

A. There is a possibility, but there is not a possibility of an error upon a material matter. It isn't possible that an error upon a material matter would have crept in. I don't think there is a possibility of that.

Q. When Mr. Narrigan made a statement to you and he told you he was so-and-so and he told you he knew a thing to be of his own knowledge, in writing down this statement did you discriminate what he heard and what he knew of his own knowledge?

A. I certainly did.

Q. Is there any such discrimination shown on your statement you have there?

A. Yes; there is.

Q. Where?

A. It say here "Investigator was appointed to find out." I believe he found out two or three instances where goods were sold.
281 That shows a discrimination. I was informed that some member of Murphy Brothers—that shows a discrimination.

Q. Show me another one?

A. I do not know the name of the investigator. I never met him.

Q. But that's a fact?

A. Yes; that's a fact.

Q. Did you say he ever told you he presided at any meeting of the tobacco association?

A. I didn't so state.

Q. What did you say there about it?

A. I said as vice president he stated to me that as vice president, the president being away, he instructed the secretary to notify the members as to what Lorillard's man had said to him.

MR. CALDWELL. I move to strike out on the same ground as heretofore.

The EXAMINER. Stricken out as to Lorillard.

MR. SMITH. As I gather from the ruling the answer to that question is not to be stricken out physically?

The EXAMINER. No.

Q. Did he tell you whether or not he ever presided at any of these meetings?

A. Well, I haven't any memorandum of it in my report.

Q. You were there and talking to him?

A. I would have stated it in my report if he had.

Q. You have no recollection of it?

A. I have no recollection about it.

Q. Did he tell you he was personally present and heard Mr. Eberbach report to the meeting—did he or didn't he?

A. He did not.

282 Q. Did he say he had gotten it from somebody else or that he heard it himself?

A. He said Mr. Eberbach later reported to the association.

Q. Did he tell you he was there when he reported it or that he got it from some one else who was there and took the statement?

A. I am going to answer it that way.

Q. Answer it rightly?

A. He told me he later reported it to the association and he probably would not have told me that if he had not known it.

Q. Did Mr. Narrigan tell you he was present at that meeting of the association?

A. I have stated what he told me.

Q. Did he tell you he heard it himself or he got it from somebody else or was present at the meeting?

A. I don't remember whether he stated whether he was present at the meeting or not, but I gathered from his statement that he was, because he stated Mr. Eberbach did report it to the association.

Q. You don't know whether he told you that he, Mr. Narrigan, got it from something he personally observed, or whether he got it from somebody else who told him?

A. No.

Q. About this story about the Lorillard Company, did he tell that he knew that of his own knowledge or somebody told him?

Mr. CALDWELL. Same objection on behalf of Lorillard Company.

The EXAMINER. Same ruling.

283 A. He told me the gentleman came to see him.

Q. Came to see whom?

A. A representative of Lorillard who handled this brand wanted to know why these goods were not being marketed, and he stated he told them they were higher than other similar goods. He said he asked me if they gave a better discount, whether the information could be given by the association to the trade, and I told him yes, and as vice president, the president being absent, I instructed the secretary to notify all members.

Q. All members of what?

A. I presume members of the association.

Q. You were there. What did he tell you he was to notify, the members of what; what did he tell you?

A. That is all I know about it. I am not a miracle man. I have not a memory that holds everything of all these numerous interviews I had with these tobacco men. I never attempted to do so. I immediately, or as soon as possible, put down in my report the whole statement of what occurred, and that is all.

Q. What about the 35 per cent you have there?

A. Later Lorillard had discontinued a discount on Turkish cigarettes on which they had been allowing 35 per cent.

Mr. CALDWELL. Same objection as to the Lorillard Company.

The EXAMINER. Same ruling.

Q. 35 per cent. Do I understand that is correct?

284 A. Well, that is the way it is. Possibly she made a mistake.

Q. You looked over that right after it was written; you looked over it, and do I understand he told you they were allowing a discount of 35 per cent on cigarettes?

A. That may be an error. It may have been 5 per cent.

Q. There is a good deal of difference between 5 per cent and 35 per cent?

A. I know there is. It strikes me now that it was an error. I don't think there was a discount of 35 per cent.

Q. And you read this very carefully?

A. I did.

Q. And now from your memory you cannot tell whether it was 8 per cent or 9 per cent or 10 per cent?

A. I am quite sure it was not 8 or 9 per cent. It was something with a 5 per cent in it.

Q. It might have been 5 per cent?

A. Yes.

Q. It might have been 25 per cent?

A. I don't know whether it was 5 or 25 or 35.

Q. It is a fact, however, that without reading that paper you could not testify as to this interview at this late date?

A. I could not.

Q. And therefore if that paper said the sales of Narrigan were \$400,000, you would say \$400,000 to-day, because it is on the paper?

A. I would, because it was on the paper. Of course, I have some recollection.

Q. Have you any definite recollection?

A. I have no definite recollection as to exact figures.

Q. And therefore you have no personal recollection yourself this day as to anything Narrigan told you as to the volume of business?

A. No.

285 Q. If the girl struck a two instead of a four you would say two hundred thousand and if she had said two hundred and twenty-five instead of four hundred and twenty-five you would say two hundred and twenty-five to-day?

A. I think I would.

Q. If she had some other name in that paper besides Mr. Eberbach, would you have repeated and said Mr. Coyle went over to New York?

A. No.

Q. Why?

A. Because there are some things on which my memory does serve me, and the commission of Mr. Eberbach's in New York was one of them.

Q. On the paper that lies before you, is there anything by which you can identify that as the paper that you turned over to Mr. Slina?

A. Yes, sir.

Q. What?

A. There are some figures made by myself in pencil.

Q. Take the second sheet—anything on the second sheet to indicate that?

A. Yes, sir.

Q. What?

A. The marks at the head of the sheet. My initials and the stenographer's.

Q. But they are in typewriting?

A. Yes.

Q. Anybody could put those on?

A. Yes.

(Objected to as argument.)

Q. I ask you whether it was in typewriting?

A. I can distinguish typewriting.

Q. Are you able to tell they are the same sheets you sent to Mr. Shinn or whether somebody in the meantime could not have
286 rewritten them and sent five sheets?

A. I told you about the first one and I can tell you about the last one of the reports; it has my signature.

Q. The other ones you can't tell?

A. No, sir.

Q. Has this other one got your initials in lead pencil or ink?

A. It has my initials typewritten.

Q. But anybody could put them on?

A. Yes; but it has some figures up there that are mine.

Q. Lead-pencil figures?

A. Yes, sir.

Q. Were they made at the time by you?

A. Yes, sir.

Q. When did you turn that over?

A. Possibly the same day or the day after it was typewritten.

Q. When was it typewritten?

A. The date of the interview was September 27th. It was probably typewritten two three days after that time.

Q. Apart from the fact standing out in your memory, you would say anything that that paper said at that time?

A. Yes, sir.

Mr. CALDWELL. In this statement I find the following: "We buy our cigarettes and tobacco from the American Tobacco Company, P. Lorillard Company, Liggett & Myers, and other large tobacco manufacturers." Will you state now whether or not he mentioned any of the other large tobacco manufacturers?

A. I am quite confident that he did not.

Q. Did you ask him who the other large tobacco manufacturers were?

287 A. I am quite confident I did not because I deemed that answer sufficient.

Q. At the time did you have in mind some complaint which you might make or which might be made against the American Tobacco Company, P. Lorillard Company or Liggett & Myers?

A. No; I don't think I did.

Q. Why was it then you didn't inquire as to the names of the other large manufacturers?

A. Because I simply desired to get information from him generally as to the source from whom he made his purchases.

Q. You state here "other large tobacco manufacturers." Were you not interested in finding out who those were—those large tobacco manufacturers?

A. I don't think I was at that time. I don't think I had in mind any complaint being made. In that particular interview I was investigating the Wholesale Tobacco Dealers' Association of Philadelphia. They were the parties against whom the complaint had been made and I had them more specifically in mind. The people from whom

they bought, their action as to making existing prices and maintaining them—that was the question I was investigating at the time.

Q. He may have mentioned to you the names of the other large tobacco manufacturers?

A. It is possible, but I don't think he did. I was investigating at that time particularly a complaint made against the wholesale tobacco jobbers of Philadelphia for fixing and maintaining their prices 288 in restraint of trade. I wasn't trying to conjure up some charges against the American Tobacco Company or the Lorillard Company or anybody else at that time.

Q. Or at any other time?

A. No. I didn't at any other time until I got information along the line of communication being made through the tobacco company or interviews being had with the tobacco company.

Q. Have you any means of correcting this error which you say is an error in reference to 35 per cent?

A. I didn't state specifically that it was an error, but I should judge that it was.

Q. Well, is the rest of your statement as reliable as this statement with reference to 35 per cent?

A. The rest of my statement is reliable and that statement, to my mind, is a mistake by the typist or stenographer.

Q. What do you say it should be?

A. My own idea would be that it would be 5 per cent, and that she misunderstood me.

Q. Would you say that the rest of your statement as as reliable as the statement that it should be 5 per cent?

A. I would say that the rest of my statement, as I said to you a moment ago, is reliable and that my statement as to this is in answer to your question as to what I think it should be.

Q. As I understand you are not attempting to vouch for the truth of any of these statements; only that this is a statement that was made to you; but whether the things themselves were true you have no knowledge?

A. Of course not. I had no knowledge as to the truthfulness 289 of the statements by those whom I interviewed except as they were corroborated by others and from sources who were supposed to know.

Q. We don't know which are corroborated and which are not corroborated?

A. No.

MR. CALDWELL. I move to strike out that part of the answer which is not responsive.

THE WITNESS. It is in answer to your question.

THE EXAMINER. I will not strike it out.

(Exception granted.)

Q. How many sheets were there of this report?

A. There are some more which Mr. Smith has in his possession.

Q. There is no signature upon any of these sheets I have in my hand, is there?

A. No, sir.

Q. This is the statement from which you were just testifying, is it not?

A. Yes, sir. But if you will remember my testimony—

Mr. TAULANE. I object to any volunteered statement. My question is answered.

Q. You said this had your signature?

A. If you will remember, I stated to Mr. Smith I had some time after interviewed him on another matter, and that portion is with Mr. Smith which has my signature. I said on the first of these four sheets there were some lead-pencil marks and on the last sheet it was signed—not on the last sheet of that, but the last sheet of my report.

Q. How do you know that came from your report?

A. I know from the substance of it that it is the report I made, and I didn't think in the matters in the files of the commission there would be fault to find.

Mr. SMITH. I submit Mr. Taulane has cross-examined before on this proposition, and it seems to me he ought to have one opportunity of cross-examining, and only one. He has gone into this matter once on cross-examination. It seems to me he should not be permitted to do so any further.

The EXAMINER. I thought Mr. Taulane misunderstood Mr. Cowie's signature on the last sheet, and I think that is as far as he ought to go.

Q. And therefore as to these three sheets there is no mark on them except this mark here, indicating in the first sheet. The last sheet of this paper has no signature on it?

A. The last sheet of my report is signed, but those three sheets are only part of my report.

(No cross-examination on the part of the American Tobacco Company.)

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Redirect examination by Mr. SMITH:

Q. The four sheets of paper which Mr. Taulane was examining you about were sheets of paper which you used to refresh your recollection as to the interview you had with Mr. Narrigan on September 27th, 1921; is that correct?

A. Yes, sir.

Q. Did you see those four sheets of paper on Saturday of last week?

A. Yes, sir.

Q. Where did you see them?

A. I saw them in the Federal Trade Commission, in your possession then.

Q. In the files of the commission?

A. In the files of the commission.

Q. Did you see them to-day before you went on the stand?

A. Yes, sir.

Q. Where did you see them?

A. I saw you take them from the files as a part of my report.

Q. Did you this morning see these papers in the official files of the commission?

A. Yes, sir.

Q. Where you had originally transmitted them?

A. Yes, sir.

Q. And did you see me take those four sheets of paper from the files of the commission and hand them to you so that you might refresh your recollection?

A. Yes, sir. I saw my signature at the end of the report there from which you took these sheets.

Q. With these four sheets constituting a report you made of your interview with Mr. Narrigan did you in your report have other sheets on another interview with Mr. Narrigan regarding another subject?

A. Yes, sir.

Q. And is it one of the sheets of that other report you signed?

A. It is the final concluding sheet of my report on the whole subject as they were in regard to the tobacco business.

Q. Both wholesale and retail?

A. Yes, sir. I included them both in one report.

Mr. CALDWELL. I move to strike out the testimony of this witness on the ground it is now apparent he is referring and stating as a fact that his signature is to some other paper he has declined to exhibit.

Q. You said on your cross-examination by Mr. Caldwell that you had no knowledge of the truthfulness of the statements made to you by Mr. Narrigan except as you found those statements corroborated in your investigations. Will you tell us the extent in which you found Mr. Narrigan's statements to be truthful by corroboration?

Mr. WALSH. Objected to on behalf of the American Tobacco Company because it calls for a conclusion, and does not state with whom or where or what—or the foundation of any such alleged corroboration.

Mr. CALDWELL. I object to it on the ground that the testimony has already been ruled out and therefore it can't be made the basis of this question. It is hearsay, and there is no chance for cross-examination, and it is incompetent and not binding on the Lorillard Company.

The EXAMINER. I don't think it proper for this witness to give testimony as to what corroboration he found.

Mr. SMITH. On cross-examination he was asked as to the truth of the things told to him by Mr. Narrigan and he said he knows nothing of the truth of those things told him by Mr. Narrigan excepting so far as corroborated by other facts he found in the investigation. I believe the purpose of redirect examination is to explain anything that is brought out on cross-examination. On that rule

it seems to me I have a perfect right to find out what he meant when he said he had a belief as to the truth of the statements by Mr. Narrigan in so far as that belief was based on information he later found out.

The EXAMINER. I don't think this witness should state his belief about this or that, but you may ask him about any facts he later made a report on to the commission.

Mr. SMITH. What are the facts you had in mind when you said on your cross-examination that they led you into the belief that the statements made to you by Mr. Narrigan were true?

Mr. WALSH. Objected to on the ground that it isn't cross-examination, because that was stricken out. It is hearsay and calls for a conclusion.

The EXAMINER. Let's see what he said. I will rule it out if it is a conclusion.

A. One fact which I learned which stood out preeminently was a copy of a printed letter to which Mr. Narrigan referred, from the American Tobacco Company, asking their customers to maintain prices at a fair profit and that they would not consider a customer who sold at less prices a desirable customer. I saw copies of that and I know I filed one with the commission.

Mr. WALSH. I move to strike that out because such a fact is not in any way corroboration of the alleged statement in the interview that any committee went to the American Tobacco Company.

The EXAMINER. I will strike that statement out because it is really an argument on the part of Mr. Cowie that corroborates some of these other hearsay statements he mentioned. I don't think it is pertinent for him to state or to testify that in his opinion this is corroborative of something else that was stated to him in that letter. Because the witness on cross-examination stated that he did not know whether any of the statements made to him by Narrigan, in his interview with him were true or not, except where they might be or

were corroborated by later information does not give commission's attorney on redirect examination the right to call for the witness' opinion as to any facts he may testify to nor to relate anything connected with this interview except admissible testimony.

By Mr. SMITH:

Q. Mr. Cowie, what are the other facts, if any, which led you to believe that the statements told to you by Mr. Narrigan were true?

Mr. CALDWELL. Same objection. He calls specifically for a conclusion. It is absolutely improper.

Mr. SMITH. Well, they have no business to ask him such questions on cross-examination.

The EXAMINER. On cross-examination, if an attorney asks an irrelevant or incompetent question and it is not objected to, does not prevent them from objecting to any question after that that relates to it by the attorneys on that side; in other words, objecting now if this

is incompetent. They are not precluded because they ask an incompetent question on their part. If I make myself clear——

MR. SMITH. You make yourself clear, Mr. Examiner, but I ask an exception to your ruling.

(Exception noted.)

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By Mr. SMITH:

Q. Mr. Examiner, I thought my question had called for a fact, but I will reframe it. Mr. Cowie, what are the facts you later found in your investigation that led you to the conclusion that the statement made by Mr. Narrigan was correct?

MR. WALSH. Objected to as incompetent.

MR. CALDWELL. Same objection on behalf of the Lorillard Company. It is certainly hearsay. He must first state when and from whom and all the facts he can.

The EXAMINER. The witness is permitted to state any facts he may have knowledge of which relate to the issues in this case or to the interview that he had with Mr. Narrigan which has been permitted to be received as testimony so far.

MR. CALDWELL. Your honor, you are not going to let him state that until he tells where and from whom received.

The EXAMINER. That will be part of his story. Proceed and tell the facts you know.

MR. CALDWELL. Objected to on the part of the Lorillard Company. (Objection overruled.)

(Exception.)

A. Mr. Narrigan stated to me that he later received a letter
297 from the American Tobacco Company addressed to the trade, in which it requested its customers to sell at prices which would give them a fair profit and that they would not consider any customer a desirable one who did not maintain such prices. I later came in possession of a printed letter containing those exact statements which was given to me by a jobber whose name I do not recall now as having been received by him from the American Tobacco Company, and I mailed that letter to the Commission, and I believe it is on file.

MR. WALSH. I move to strike out the answer, because the examiner has already stricken out an answer of the same purport to substantially the same question.

The EXAMINER. It is not testimony as against the American Tobacco Company.

MR. TAULANE. I move to strike it out on behalf of the other respondents.

The EXAMINER. I admit it as testimony against Narrigan in this case.

By Mr. SMITH:

Q. Did you find, Mr. Cowie, in your investigation that certain wholesalers of tobacco who were members of the association were cut off of the direct list of tobacco manufacturers?

Mr. CALDWELL. Objected to on the ground that it specifically calls for a conclusion and not for facts. It calls for hearsay, and it is incompetent.

298 (Same objection on behalf of the American Tobacco Company.

Objections overruled.

Exception.)

A. I can only tell you what the people whom I interviewed told me.

Q. In your interviews with other people what were the things which led you to say on your cross-examination that your later investigation led you to believe what Mr. Narrigan had told you was true?

A. No; I didn't state that. He asked me in regard to what I believed of the statements were true. My answer was that I believed his statements were true where they were corroborated by other sources.

Mr. CALDWELL. I move to strike out this answer as not binding on the Lorillard Company.

The EXAMINER. He has not said anything about the Lorillard Company.

Mr. TAYLOR. I object to it on the part of the other respondents.

(Objection overruled.

Exception.)

By Mr. SMITH:

Q. Was the statement you made in answer to a question on cross-examination, that is, as to corroboration, confined to the statements made by Mr. Narrigan in his interview with you?

A. No.

299 Q. I mean the corroboration or the proof of the corroboration which you testified to on your cross-examination. Was that confined to the interview you had with Mr. Narrigan?

Mr. CALDWELL. I object on the ground it is hearsay.

The WITNESS. If I understand the question, it would be the same as to my interview—that I cannot vouch for the truth of what is in my other interviews other than as they were corroborated.

Mr. SMITH. Mr. Cowie, were you subpoenaed to testify in this proceeding?

A. I was.

Q. And brought here from your home in Washington to Philadelphia by subpoena?

A. Yes, sir; very unwillingly, too.

HENRY M. LAKOFF was thereupon called as a witness; having been duly sworn, testified as follows:

Direct examination by Mr. SMITH:

Q. What is your business, Mr. Lakoff?

A. Wholesale confectioner and tobacconist.

Q. Where is your place of business?

A. 322 Market Street.

300 Q. Philadelphia?

A. Philadelphia.

Q. Where is your home?

A. 132 North 62nd Street, Philadelphia.

Q. How long have you been in business at 322 Market Street?

A. Since October, 1920.

Q. Were you in business prior to 1920?

A. Yes, sir.

Q. Tobacco business?

A. Yes, sir.

Q. What time previous to 1920 were you in business?

A. Up to about October, 1919.

Q. And when did you recommence business?

A. In October, 1920.

Q. October, 1920?

A. Yes, sir.

Q. You were out of business practically a year?

A. Almost a year.

Q. When you recommenced business in October, 1920, who did you buy your tobacco from?

A. We started to buy from Peter F. Murphy Company.

Q. When you commenced business in October, 1920, did you buy from anybody other than Peter F. Murphy Company?

A. We bought from out of town—we found the jobbers had a fixed price.

Mr. WALSH. I move to strike that out.

The EXAMINER. Ask him what he knows.

Mr. CALDWELL. I move to strike it out as not responsive.

Mr. SMITH. I am willing.

The EXAMINER. Stricken out.

(Witness produces invoices from his pocket.)

The WITNESS. Not until April, 1921.

301 Q. So that in the period from October, 1920, to April, 1921, you bought from nobody but Peter F. Murphy Company?

A. Peter F. Murphy Company.

Q. They are wholesale tobacco dealers of Philadelphia?

A. Yes, sir.

Q. Was there any reason why in that period from October, 1920, to April, 1921, you bought only from Peter F. Murphy Company?

Mr. CALDWELL. He is calling for a conclusion and not for a fact and I object on that ground.

The EXAMINER. Go ahead. I will hear what he has to say.

The WITNESS. Yes.

Q. What was the reason?

(Objected to on the ground that it is calling for a conclusion.)

Objection overruled.

(Exception.)

A. The reason that we didn't buy of anybody else was that they were one price, with the exception of the goods we bought from out of town.

Q. That is the prices of all of the Philadelphia wholesalers were the same?

Mr. CALDWELL. Same objection.

The EXAMINER. Same ruling.

302 A. Yes.

Q. Where did you get the information that the prices of the Philadelphia wholesalers were all the same?

A. We had tried one or two or three or four, and we could not get any better price, and we came to the conclusion that it was a fixed price.

Mr. WALSH. I move to strike out the answer, as that is not any reason why the price is fixed, but is a mere conclusion of the witness, not supported by any facts of any kind and is incompetent and highly prejudicial.

(Same objection by Mr. Caldwell on behalf of the Lorillard Company.)

(Same objection by Mr. Taulane.)

Mr. SMITH. Are we to understand the Wholesale Tobacco Association did not agree upon a particular price?

Mr. WALSH. Seriously, there is no doubt of it, and counsel has no right to make any such statement. There is no evidence of it.

The EXAMINER. That part of his testimony in which he says "we came to the conclusion that there was a fixed price" I think is improper. He has given the facts and he has given the reasons he quit trading with them, and we will strike out "we came to the conclusion there was a fixed price."

303 Q. Will you give us the names of some of the wholesalers that you obtained prices from?

A. Yes, sir.

By Mr. TAULANE:

Q. Did you do it yourself personally?

A. Yes, sir; Murphy Bros. of Camden. Myer Blumenthal on South Street.

Q. Anybody else?

A. A. B. Cunningham Company.

Q. Have you finished naming them?

A. Yes, sir.

Q. In 1920 did you buy anything from the Cunningham Company?

A. No.

Q. Did their salesman visit your place of business for the purpose of trying to sell you?

A. Yes, sir; he was often on in the store trying to sell us different items like matches and other specialties that they bought up and tried to sell again.

Q. Did he endeavor to try to sell you tobacco and cigarettes?

A. Yes, sir; about May 1st he said to me, "Why don't you give us some of your business? The price is the same. The prices are standard from the factory." I said, "You can never tell." He said, "You know what happens to the fellow who sells below the price" (Objected to by Mr. Caldwell on behalf of the Lorillard Company.)

304 The EXAMINER. It has no relation to the Lorillard Company and is not received as against the Lorillard Company.

Mr. TAULANE. I object to it on behalf of the Cunningham Company. It was only a salesman and that is not within the scope of his authority.

(Objection overruled.

Exception.)

Q. Did the salesman say anything as to the jobbers' prices to retailers?

A. Not at that time; no, sir.

Q. Did this salesman of Cunningham's at that time say anything to you about jobber's prices to the trade?

A. I have not discussed the prices to the trade.

Q. I am speaking of jobber's prices to retailers or sub-jobbers?

A. To sub-jobbers, we have discussed that. That was about June 21st that he came in, and, in fact, I bought some matches from him, and he said to me "The jobbers have gotten together and fixed up new plan," and I asked him what the plan was, and he said there would only be 7 per cent on tobacco—

Mr. TAULANE. I object to this. It could not be evidence against the Cunningham Tobacco Company; it is only the statement of the salesman. There is no evidence he was authorized to make any such statements.

305 The EXAMINER. I will rule it out as to the other jobbers except the one he represented. The salesman had no right to bind any other jobbers because he was not a member of the association.

(Exception for the Cunningham Company.)

Q. What, if anything further, did the salesman say to you at that occasion?

A. The cigarettes will also be 7 per cent, and a further allowance of $7\frac{1}{2}$ cents per thousand if bought in ten thousand lots or over. Then I asked him what the price will be to the retail trade, and he said the same thing, and I said to him, "If that is the case the sub-jobber would not be able to live." And he said "that is the way they fixed it up, anyhow; 250 per cent looks good to them."

Q. What did he say about 250 per cent?

A. I asked him how he figured 250 per cent. He said, "There are 52 weeks in the year; 5 per cent makes 260 per cent, turning the stock weekly, which it is customary for certain jobbers—to turn their stock weekly."

Mr. TAULANE. Objected to.

(Objection overruled.

Exception.)

Q. Did this salesman say anything on that occasion about sub-jobbers?

A. In what way?

Q. Did he say anything at all about sub-jobbers? Did you and this salesman discuss sub-jobbers when he told you a turnover once a week looked good to them?

A. I said to him, "The sub-jobber will not be able to live under those conditions," and he said, "Well, that's the way they fix it up, anyhow."

Q. What, if anything, did he say about the jobbers of Philadelphia desiring sub-jobbers to continue in business?

A. He says, "The jobbers don't want the sub-jobbers, because they always hurt their business. Nobody has control over them."

Q. How did you classify yourself, as a retailer or as a sub-jobber?

A. We classify as a jobber, if the thing would be equal.

Q. Do you buy direct from tobacco manufacturers?

A. Certain ones; yes, sir.

Q. Which are the manufacturers you buy direct from?

A. Frismuth Brothers.

Q. What do they manufacture?

A. Tobacco. Scott, Dill & Company, Lares Brothers, and several other manufacturers of special tobaccos.

Q. Are these three firms manufacturers of special tobacco products?

A. No, sir; standard tobaccos. They all make cigarettes—cigarettes and tobacco. Scott, Dill & Company have tobacco.

Q. Are you on the direct list of the American Tobacco Company?

A. No.

Q. Of the Lorillard Company?

A. No.

(Objected to.

Objection overruled.)

Q. Did you buy from the American Tobacco Company?

A. No, sir.

Q. Did you buy from the Lorillard Company?

A. No, sir.

Q. Did you buy from Liggett & Myers?

A. No, sir.

Q. Any other large manufacturing companies?

A. No, sir.

Q. Do you deal in the tobacco products of the American Tobacco Company?

A. Yes, sir.

Q. Of the Lorillard Company?

A. Yes, sir.

Q. Of Liggett & Myers?

A. Yes, sir.

Q. Where do you secure those products of those companies?

A. At the present time?

Q. Yes.

A. From five or six different sources.

Q. Not from manufacturers, however?

A. No, sir.

Q. Do you sell tobacco to other tobacco dealers?

A. Some; yes, sir.

Q. Has that been a part of your business since 1920?

A. Yes, sir.

Q. When you found out that you could get no better price from the other Philadelphia jobbers than the prices you were getting from Peter F. Murphy Company, what effect, if any, did that have upon your business of selling to other tobacco retailers?

(Objected to by Mr. Caldwell on the ground that other tobacco dealers than the one, two, three, or four he mentioned, assumes something testifies to which it has not been testified to and calls for a conclusion.

Same objection on the part of the American Tobacco Company.)

The EXAMINER. I think he can state, if it is a fact that these two people—these two tobacco firms had a certain price and that caused him to go elsewhere, and what effect that had upon his sales or upon his sales to his customers. I think he can answer that question.

The WITNESS. I worked in this way, the jobber allowing to the dealer the same discount they allowed us, we were forced to sell for the same price to the dealer, and thereby we simply worked for nothing.

Mr. CALDWELL. I move to strike that out except as to the one, two, three, or four he mentioned. I think he ought to make it specific as to whether he refers to them or not.

The EXAMINER. I am going to permit him to answer that question because all the jobbers maintained the same maximum discount and I think this is pertinent to the prices regulated by that discount.

Q. Mr. Lakoff, you used the word dealer in answering the last question. Do you mean the tobacco retailers, the retail tobacco dealers?

A. Yes, sir.

309 Q. Had you been reselling tobacco to retailers in tobacco?

A. To retailers; yes, sir. That is what the most of our sales are.

Q. Has that been the most of your sales since you resumed business in October, 1920?

A. Yes, sir.

Q. After you learned that the highest discount from list by the Philadelphia tobacco jobbers would be 7 per cent, who did your retail tobacco customers purchase their tobacco from—you or some other person or persons?

A. At the time this occurred, the Saturday before this occurred—we called up Peter F. Murphy Company and I asked him if he heard such and such arrangement is going to take effect, and he told us, "Yes; it will take effect next month," and being so sudden we were unable to do anything else but to meet the prices, and we simply lost money on all the sales we made.

Q. Do you mean by meeting the prices you had to sell to your customers at 7 per cent off the list price?

A. Yes, sir.

Q. That was the same price the wholesale members of the association were allowing to the retailers?

A. Yes, sir; they charged the retailers the same price they charged us.

Q. How many retail customers did you have at that time—approximately?

A. At what time do you refer to?

Q. At the time the maximum discount of 7 per cent went into effect?

A. I judge at that time we had a list of over 5,000 all over the United States.

110 Q. What became of that trade when the Philadelphia wholesalers made the maximum discount to you of 7 per cent?

A. We hung on to them just the same.

Q. You sold them and allowed them the same percentage that they were allowing you?

A. Yes, sir.

Q. Did you make any money on these transactions?

A. Oh, we lost money, sure enough.

Q. Prior to the time when you were buying from the Peter F. Murphy Company—that is October, 1920—do you know whether you were getting a better price from the wholesalers of Philadelphia than those wholesalers were giving to the retail stores?

A. The very same prices were given to the retail stores.

Q. Before the organization of this association?

A. They had some kind of an organization already at that time in 1920.

Q. I am speaking of the time before 1920.

A. You mean 1919.

Q. Before the organization was perfected by the tobacco wholesalers of Philadelphia, you say in 1919, when I understood you were in business—were you getting a better discount from the Philadelphia wholesalers than those wholesalers were giving to the retail stores?

A. Oh, yes, sir.

Q. You were making money, I presume?

A. Yes, sir; we made money according to the turnover.

Q. Was your discount in 1919, allowed to you by the jobber, based in any degree upon the quantity in which you purchased?

A. No, sir.

311 Q. Did you have a special arrangement with some one or more wholesaler?

A. Well, it was simply a matter of who wanted the business.

Q. There was competition for your business at that time and you bought wherever you could make the best deal?

A. Yes, sir.

Q. What difference was there, if any, between the conditions existing in Philadelphia in the tobacco business in that respect between 1919 and 1921 when the organization of tobacco wholesalers was in existence?

(Objected to.

Objection overruled.

Exception.)

A. Is that referring to how it affects our business?

Q. I am trying to find out whether there was more competition from your business or did you have better advantages in buying in discount before the organization of this tobacco association than before it was in business?

A. Before this organization was formed in 1919 we had an equal chance to compete, but when the organization was formed simply our hands were tied and we could not help ourselves in any way, because they all had the one price and the retailer got the same price also.

Q. Before the organization the wholesaler had different prices and you bought off the wholesaler, you bought from the wholesaler you could get the best terms from?

A. Yes, sir.

312 Q. Did you ever buy from the Bayonne Tobacco Company of Bayonne, New Jersey?

A. Yes, sir.

Q. Did you buy from them in September, 1921?

A. Yes, sir.

Q. How did they sell to you, by salesmen visiting your store or did you order by mail?

A. No, sir; it was merely a matter of relationship. We had shipped some goods to them and they had shipped some goods to us.

Q. Were these negotiations by mail?

A. By mail.

Q. Do you remember getting a shipment from the Bayonne Tobacco Company on September, 1921?

A. Yes, sir.

Q. Do you remember what that shipment consisted of?

A. Yes, sir.

Q. What?

A. 25,000 Fatimas, 100,000 Piedmonts 10's; 100,000 Piedmonts 20's; 50,000 Chesterfields; 10 cartons of Copenhagen snuff; 25,000 Recruits.

Q. What tobacco company makes the Fatimas?

A. Liggett & Myers.

Q. What tobacco company makes Piedmonts?

A. Liggett & Myers.

Q. What tobacco company makes Chesterfields?

A. Liggett & Myers.

Q. What tobacco company makes Recruits?

A. Liggett & Myers.

Q. What tobacco company makes Copenhagen snuff?

A. Copenhagen snuff is made by Weyman.

313 Q. Were you dealing regularly with the Bayonne Tobacco Company up to September, 1921?

A. Yes, sir.

Q. How long after September, 1921, was your next purchase from the Bayonne Tobacco Company?

A. We were able to get Lorillard goods, but we were not able to get Liggett & Myers any more.

Q. When did you make your next purchase from the Bayonne Tobacco Company after September, 1921?

A. We had another shipment on the 22nd.

Q. Of September?

A. Yes, sir.

Q. When was your next shipment from the Bayonne Tobacco Company after September 22nd?

A. I have not the date of any further shipments with the exception that we would order them now and then. They were not able to ship all the goods that we needed.

Q. How were those deliveries from the Bayonne Tobacco Company made you?

A. By freight.

Q. Were they drop shipments?

A. No, sir.

Q. Did you have any difficulty in getting them from the Bayonne Tobacco Company after September, 1921, or the products of Liggett & Myers?

A. We were not able to get any.

Cross-examination by Mr. TAULANE:

Q. How long have you been in business?

A. Since October, 1920.

Q. Is that the first?

A. You are asking me how long I was in business? Since a boy, 17 years.

314 Q. You were in the tobacco business before 1920?

A. Yes, sir.

Q. Were you out of business?

A. Yes, sir. You want to know how long previous to that I handled tobacco? For about 6 years.

Q. When did you stop?

A. 1919.

Q. What happened?

A. I had financial difficulty.

Q. You mean you went into bankruptcy?

A. Yes.

Q. And when did you go into bankruptcy?

A. It was in October.

Q. What year?

A. 1919.

Q. And you owed Murphy Brothers at that time?

A. Murphy Brothers; yes. P. F. Murphy Company, \$3,000.

Q. You owed A. B. Cunningham Company?

A. Yes, sir.

Q. How much?

A. About \$300.

Q. Your liabilities were about \$25,000?

A. They were \$36,000 and the assets were 75 per cent.

Q. What dividend did you pay?

A. Sixty-two per cent.

Q. Isn't it a fact you paid 25 per cent?

A. Sixty per cent to my knowledge.

Q. When were you discharged?

A. About three months after.

Q. When was that?

A. I could not give you the exact date.

Q. About when?

A. I could not give you the exact date because I don't re-
 315 member now. It was a crime in itself and I had the wrong
 legal advice and it was a crime in itself.

Q. Can you give us the date when you were discharged?

A. I could not give you the date. I don't know. I didn't know
 you were going to bring up such a question.

Q. When did you resume business?

A. October, 1920.

Q. And you took up the same business you had been in before?

A. Yes, sir.

Q. What was your capital?

A. My capital was my ten fingers.

Q. You had none worth speaking of?

A. No; my brother was the financial man.

Q. You don't mean to tell us here the Philadelphia jobbers were
 running after you to get your business in October, 1920, when you
 had nothing?

A. They didn't run after us, but they ran after our money.

Q. You didn't have any?

A. Oh, yes; we had plenty to pay. My brother had the money.

Q. Had you capital when you started in business in 1920?

A. I would like to have it for my own three years from now.

Q. I ask you, did you?

A. Absolutely.

Q. This Philadelphia Jobbers' Association, you speak of, had nothing to do with your bankruptcy?

A. No.

Q. You had been buying from Cunningham & Company when in business before your bankruptcy, had you not?

A. Yes, sir.

Q. Before you resumed business in October, 1920, what was the maximum of discount you ever got from the Cunningham Company?

A. When was that?

Q. Before October, 1920.

A. Before 1920?

Q. Yes; before you failed.

A. Well, we only bought from Cunningham Company such items we were unable to get from anybody.

Q. What was the maximum discount you got?

A. Eight per cent, if my memory served me right.

Q. That was on both tobacco and cigarettes?

A. Yes.

Q. And on any goods you bought from Cunningham after you resumed business you got the same discount, if you bought any goods?

A. No; we only got 7 per cent, 7 per cent on cigarettes.

Q. What did you get on tobacco?

A. Seven on tobacco and 7 on cigarettes and an additional $7\frac{1}{2}$ cents on the thousand.

Q. In other words, the salesman from the Cunningham Company only offered you 7 per cent on cigarettes and $7\frac{1}{2}$, depending on what quantity you bought; is that right?

A. The salesman was not the man who offered it.

Q. Who did offer it?

A. I phoned the order in to A. B. Cunningham Company.

Q. This was in October, 1920?

A. No, sir; that was the first purchase we made from A. B. Cunningham, June 30th, 1921, when we knew the scheme was fixed up.

Q. And what discount did you get?

A. Seven per cent on tobacco, 7 per cent on cigarettes, with an allowance of $7\frac{1}{2}$ cents a thousand additional if 10,000 were purchased.

317 Q. And therefore even so late as June, 1921, you did not receive from Cunningham Company—you didn't receive this 8 per cent; you only got 7?

A. We got 8 per cent on anything we bought before.

Q. That was before you failed?

A. No, sir.

Q. When was it?

A. The time between we opened the store and June 30th. I could not give you the exact date; I haven't the bills with me. It was only small items we bought and got 8 per cent.

Q. That was right after you opened the store?

A. Yes, sir.

Q. Got 8 per cent on both items?

A. Yes, sir.

Q. When next did you get 7 per cent?

A. June 30th, 1921, on matches.

Q. What was the size of the order?

A. \$130.

Q. That was the first order?

A. It was a small order.

Q. You got 7 and 7?

A. Yes, sir.

Q. Did Cunningham Company salesmen call on you regularly to get your trade or did you 'phone in?

A. He came there many, many times. We didn't give him any encouragement.

Q. These orders that were given, how were they given?

A. That was afterwards, when this price went into effect all over the city—

Q. I am asking you about these goods you bought from A. B. Cunningham after October, 1920; how were the orders given?

A. We went over and got them. Phoned in to them first.

318 Q. What was the first order's date?

A. I could not give you the date.

Q. Who was this salesman?

A. I don't know his name. The gentleman who sold me matches. I could not tell you his name. Perhaps Mr. Eberbach could tell you his name.

Q. How much matches did you buy?

A. Bought a case of matches, smokers, and a case of Waltham

Q. How many?

A. Fifty-five and seventy-five per gross.

Q. How much altogether?

A. About \$65.

Q. When you bought these goods from Murphy what discount did you get?

A. He didn't have these goods.

Q. When you bought any goods from Murphy after October, 1920?

A. Eight per cent.

Q. Did you ever get a better discount than that?

A. No.

Q. What discount are you getting to-day?

A. Must I answer that question?

Q. Certainly.

The EXAMINER. You needn't tell him who you get it from, but tell the discount you get.

A. Ten to eleven per cent. That is what we are getting.

Q. By that you mean 10 and 11 per cent discount on the list prices on these goods?

A. Yes, sir.

Q. How long have you been getting that?

A. In fact, prior to this new arrangement that was made, we bought from other people at 9 per cent in Philadelphia.

319 Q. But not from Cunningham?

A. No; but from sub-jobbers.

Q. Any jobbers?

A. No; sub-jobbers. The jobbers had all one price.

Q. Nine per cent?

A. Eight per cent; it was fixed.

Q. After October you say?

A. Yes, sir.

Q. Were you buying these goods from sub-jobbers for 9 per cent?

A. Yes, sir.

Q. Could you not have bought the goods for 8 per cent?

A. Why pay Cunningham 8 when I can get them for 9?

Q. What was that?

A. At this very time we got 9 and they only gave 8.

Q. When was that?

A. December, 1921.

Q. You have not answered my question yet. How long have you been receiving 10 and 11 per cent discount from the price list?

A. I can't give you the date.

Q. Go back and give me the first one.

A. Yes, sir; I will—well there is one as far back as February.

Q. Of what year, sir?

A. No, that's 1922—you don't want that?

Q. You have one there as far back as February, 1922?

A. Yes; but that's further down.

Q. Give me an earlier one—what discount were you getting in December, 1921?

A. I got 9 from the sub-jobber.

Q. When?

A. December 12th, 1921.

Q. Have you any earlier dates than that?

A. Here I have one for April.

Q. 1921?

A. Yes, sir; 9 per cent.

320 Q. Will you explain to me how a sub-jobber could sell to you at 9 per cent?

A. He may have gotten them from one of his jobber friends that had certain confidence in him.

Q. Was it a big order you had?

A. Yes. This is only the beginning of it. There would be a big pile of them.

Q. You had a great many in April?

A. I brought along the bills.

Q. Did you get 9 per cent or 10 per cent in February or March, 1921?

A. February, 1921, you are asking? We were getting 10 at that time.

Q. Could you get all you wanted at that time, in February, 1921, you could get all the goods you wanted with a discount of 10 per cent from sub-jobbers?

A. Just a moment—this is 1922—I am in error in this; 1921—I have a sub-jobber from which we have bought goods at 9 per cent.

Q. You could have gotten all you wanted?

A. No, sir; they didn't have the full line and we bought whatever we could on that.

Q. How about January, 1921?

A. December isn't far away from January. We bought at the same time continuously at whatever we could get.

Q. From October, 1920 on, you frequently got as high as 9 per cent?

A. From sub-jobbers—not from this bunch.

Q. More than one sub-jobber you got this discount from?

A. There were two or three people we got it from.

321 Q. They supplied most of the stuff you sold?

A. No; they only had certain items at times.

Q. The goods you bought from Murphy after October, 1920, were at what discount?

A. Eight per cent.

Q. Any variation?

A. No, sir.

Q. At no time?

A. Not at that time.

Q. How soon after you did get it at what I call a higher discount—when did you buy at a higher discount than 8 per cent off from Murphy?

A. Mr. Examiner, if this would not be a name specified, I would gladly answer, but counsel puts a name on—Peter F. Murphy. If I must answer, I will.

The EXAMINER. Why would it not be sufficient if you would ask him what time or if at this time he got this discount or better discount from some member of the association?

Mr. TAULANE. All right.

Q. Did you, subsequent to October, 1920, get a better discount than 8 per cent from any member of the association?

A. Yes, sir.

Q. When did you begin to get it—as a matter of fact, did you start to get it shortly after October, 1920?

A. About 10 weeks elapsed that we were not able to get any.

Q. After 10 weeks elapsed you started to get 9 per cent or better?

A. I have the date before me now—

Q. Answer that question.

322 A. We were not able to break the ice until October 25, 1921—to get a better discount from the members of the association.

Q. Then I understand you to swear that from no member of the association between October, 1920, and October, 1921, you received any discount greater than 8 per cent?

A. No, sir; not 8 per cent, 7 per cent, that was the new schedule.

Q. Seven per cent?

A. Yes, sir.

Q. At no period?

A. No, sir.

Q. Were they all 7 per cent between that period?

A. Seven per cent and 7½ cents a thousand on any purchases over 10,000.

Q. Do you know why you didn't get 8 per cent on tobacco?

A. Because that was the way matters were fixed up.

Q. Didn't you know the maximum discount was 8 per cent for tobacco?

A. I only knew 7.

Q. Isn't it a fact at this time when you say you were only getting 7 per cent you had a very poor credit because you just came out of bankruptcy?

A. We had the money and we didn't ask for credit.

Q. You didn't ask for any credit?

A. No, sir; we were able to pay the money to whoever came along with the goods.

Q. Didn't you buy goods from Cunningham on credit between October, 1920, and October, 1921?

A. Whatever small purchases we made we paid cash.

Q. Didn't you have credit with A. B. Cunningham between that period October, 1920, and October, 1921?

A. Not to my recollection. The first bill A. B. Cunningham sent us, the first invoice we got from A. B. Cunningham on open account was not solicited, and it was for these matches. We didn't ask any credit.

Q. Whether you asked for credit or not you were given credit?

A. When a man brings goods and don't ask for money we are not going to throw it at him.

Q. You get credit?

A. Yes; that's no crime.

Q. I ask you, isn't it a fact that they were charged to you—the matches?

A. Yes.

Q. Didn't you between October, 1920, and October, 1921, get a better discount on purchases from Murphy, that is P. F. Murphy Brothers, during that period?

A. No, sir; we were not able to budge them.

Q. How about Blumenthal?

A. No, sir; I went down personally there and Mrs. Blumenthal said, "No; we can't sell for less price than the association price."

Q. And what was that?

A. Seven and seven.

Q. Did you get 7 and 7 on your Bayonne purchases during this period?

A. We got a better price than that.

Q. What was your price on these goods?

A. Mr. Examiner, do I have to tell that?

The EXAMINER. I think that is confidential dealing between people that ought to be observed.

By the EXAMINER:

Q. Go ahead and answer it since he insists.

324 A. The arrangement we had with the Bayonne Company was we shipped them goods, whatever they would not be able to get there on 10 and 1 basis, and they sell us whatever we need.

By Mr. TAULANE:

Q. What do you mean by that?

A. Ten and one basis. Mr. Examiner, I don't want to answer that question because this will be used as a tool to injure a friend and I don't want to answer the question.

The EXAMINER. Well, the attorney insists on it.

Q. Now, did you ship the Bayonne Company goods?

A. Yes, sir.

Q. What goods?

A. Certain merchandise they were not able to get there.

Q. You mean the standard goods?

A. Not on cigarettes, but cigarettes and matches and so on.

Q. By the way, did you say you had 5,000 customers?

A. Yes, sir; at that time.

Q. What time?

A. In June, 1921.

Q. In June, 1921?

A. Yes, sir.

Q. Did you bill them up between October, 1920, and June, 1921?

A. What was the question?

Q. Did you create that trade between October, 1920, when you went into business, and June, 1921?

A. Yes, sir.

326 Q. And you created that business notwithstanding the fact you said you could not get anything but the maximum discount of 8 per cent?

A. That was not the question at the time. My way was to get the business—to establish the orders back.

Q. Notwithstanding this rule you build up a trade of 5,000 customers in the period of 7 months?

A. Yes, sir.

Q. Were those customers the consumers or dealers?

A. Dealers.

Q. Where?

A. All over the country.

Q. How did you send them out?

A. By freight, parcel post, express, boat.

Q. How did you get this trade?

A. By soliciting.

Q. By salesmen or advertising?

A. Advertising.

Q. Was it a mail-order business?

A. Yes—catalogue.

Q. Catalogues at cut prices?

A. Yes, sir.

Q. Now those 5,000 customers you had, what was the volume of business per year for them?

Mr. SMITH. Mr. Examiner, A. B. Cunningham & Company through one of its officers, Mr. Eberbach was on the stand yesterday and was asked by counsel for the commission if he had any objection to stating the volume of his business and when Mr. Eberbach stated he did object to stating here the volume of his business we courteously refrained from asking that question, and I ask the same courtesy to be extended by the gentlemen here who represents the respondent.

326 The EXAMINER. I don't think it is material as to what volume of business he did.

Q. How far west, or away from Philadelphia, were those customers?

A. I said all over the country.

Q. All over the United States?

A. Yes, sir; as far as San Francisco. We shipped some goods to the Panama Canal.

Q. What kinds of goods?

A. Different goods that we handle, including cigarettes.

Q. These products were American Tobacco Company and Reynolds and the other goods?

A. Yes, sir.

Q. And your business continued to increase from October to June?

A. Yes, sir.

Cross-examination by Mr. WALSH:

Q. I am somewhat interested to know just how you operate. Are you in the wholesale business of cigars and confectionery?

A. Yes, sir.

Q. What is the name of your company?

A. Lakoff Brothers.

Q. Is it a corporation?

A. No, sir; partnership.

Q. You and your brother Isaac?

A. Yes, sir.

Q. It is strictly a wholesale business?

A. Wholesale business only.

Q. How do you dispose of your goods, Mr. Lakoff? Tell us your system please.

327 A. Our system is by sending out catalogues to dealers all over the country.

Q. Dealers?

A. Yes, sir.

Q. Retail dealers?

A. Dealers of cigarettes, tobacco, and confectionery.

Q. Sending out catalogues?

A. Yes, sir.

Q. Do you list the price of cigarettes?

A. Yes, sir. We only got one price. We don't juggle.

Q. Does that catalogue contain the price at which you sell Lucky Strike cigarettes?

A. Yes, sir.

Q. What does that show the price you sell Lucky Strike cigarettes to be?

A. I haven't the catalogue with me, but I can tell you what they are—\$6.24 for 20's.

Q. For 20's?

A. Yes, sir.

Q. Is that one package?

A. One thousand.

Q. Six and a quarter per thousand, is that right?

A. Yes, sir.

Q. Is that what you sell your cigarettes for according to your catalogue?

A. Yes, sir.

Q. How has that price varied since you and your brother have gone into business—has that been the standard price since you went into business for Lucky Strike cigarettes?

A. According to the price that the market prevailed.

Q. I am asking you about your price. You have gotten out catalogues ever since you have been in business?

A. Yes.

Q. What price has Lucky Strike as appears per thousand in your catalogue?

A. We change them.

328 Q. I am asking you to tell us the range of price?

A. If the cigarettes were reduced we, of course, had to reduce them.

Q. How did the range of prices run in your catalogue since you and your brother started in business in October, 1920. I understand the price is now \$6.25 a thousand. How has it run from this time back to October, 1920? Is it more or less?

A. Our catalogue is printed every month, and if the price is down we reduce it accordingly.

Q. I have no doubt, but I want to know how that range of price existed?

A. I don't understand what you are asking.

Q. How long since you and your brother have been in partnership up to the present time—just how many months is it?

A. Now?

Q. Yes.

A. Two years.

Q. Two years?

A. Yes, sir.

Q. At the present time you are advertising Lucky Strike in your catalogue at \$6.25 per thousand?

A. Yes.

Q. Has it at any time in the last two years been higher than \$6.25?

A. \$6.60, and various prices.

Q. That is the highest price ever asked for it?

A. No, sir; I could not give you that off hand, all those changes.

Q. I am asking you to tell us if you can what you have advertised in your catalogue for Lucky Strike?

A. Whatever the market price was. If you want the particular prices I will be glad to get our catalogue and let you have it.

329 Q. I am asking you to testify from your recollection?

A. We are handling 700 different items and I can't recall them all. They are changing every two months.

Q. In the last two years you have sold Lucky Strike at less price than \$6.60 per thousand, advertised in your catalogue?

A. Here of late we did when the price dropped.

Q. What is the lowest price in the last two years you sold Lucky Strikes at?

A. \$6.25.

Q. I understand the present time your catalogue price at which you sell Lucky Strikes is \$6.25 per thousand, is that right?

A. Yes, sir.

Q. At what price do you buy per thousand?

A. Well, if you have a pencil there you can figure it up; \$6.80 less 10, and some less 10 and 1.

Q. \$6.80 per thousand less 10?

A. Yes, sir.

Q. Isn't the price today to the jobber \$6.20 per thousand?

A. Not to my knowledge.

Q. What are you paying for cigarettes now?

A. What kind of cigarettes?

Q. Lucky Strike?

A. Lucky Strike you are talking about—well, there were so many different prices that we have paid and we have rebates on them.

Q. I am not asking you what you are quoting. What did you get these cigarettes you are selling at \$6.80 a thousand for? What did you pay for them?

A. \$6.11.

Q. \$6.11 per thousand?

A. Yes, sir.

330 Q. The difference between your purchase price and your selling price is 11 cents per thousand?

A. Fourteen cents per thousand.

Q. Which is the larger, your tobacco business or your confectionery business?

A. Well, the tobacco business is a good part of our business.

Q. On which business do you sell most?

A. We push anything we can sell.

Q. Which is the greater portion of your business?

A. We have no favorites. We strive to sell every item we have in the store.

Q. You advertise as a cut rate house?

A. Yes, sir.

Q. Cut rate in brand tobacco?

A. Not necessarily tobaccos. Everything we advertise is the same way. There is no difference.

Q. Do you buy now from regular jobbers?

A. Yes, sir.

(Meeting adjourned to to-morrow morning at 9.30 in this room.)

331 BEFORE THE FEDERAL TRADE COMMISSION

FEDERAL TRADE COMMISSION
VS.
WHOLESALE TOBACCO DEALERS
AND, et al

Docket No. 886

PHILADELPHIA, Pa., October 19, 1922.

Met pursuant to adjournment; 10.00 o'clock a. m.

Before George McCorkle, examiner.

Appearances: Messrs. Smith and Haas for the Federal Trade Commission; Messrs. Taulane, Walsh, and Caldwell, for respondents.

Examiner McCORKLE. Are you ready, gentlemen?

Mr. SMITH. Yes, sir; we are ready to proceed, if your honor please.

332 HARRY LAKOFF resumed the stand and further testified as follows:

Redirect examination by Mr. SMITH:

Q. Mr. Lakoff, as to going into bankruptcy as you testified on your cross-examination yesterday afternoon, was the reason for that your tobacco business?

A. It was a matter of wrong legal advice as I explained. I had a lot of cigarettes on hand and the market began to drop and when I went over to see him to consult him he considered it a crime to have them.

Q. That is, you didn't get rid of your cigarettes when you should have gotten rid of them?

A. Yes.

Q. And the market fell and you found yourself caught?

A. Yes; he kept on—instead of giving me support and the right kind of advice—he kept on threatening me until I dropped on the street for ten days.

Q. You were caught with your cigarettes?

A. Yes, sir.

(Objected to.

Objection overruled.)

Q. Was that the reason for your bankruptcy?

A. It should not have been at that time.

Q. Was it the reason for your going into bankruptcy, the loss of the value of your cigarettes?

A. That was it mostly, and wrong advice.

333 Q. Not advice as to the tobacco business?

A. No, sir.

Q. You said you bought some tobacco products at 10 and 1 while the Philadelphia Tobacco Jobbers' Association was in existence. What were those goods that you bought at that price?

A. Well, we bought Liggett and Myers until those two spies got the name and address of the people we got them from and also rentals.

MR. WALSH. I move to strike out about the two spies getting the name and address from whom they bought these goods. There is no such proof at all.

MR. SMITH. The brother of this witness has testified that some strange men examined the containers of these tobacco shipments and the wholesale tobacco jobbers' association had a paid investigator. It has also been shown that after this shipment, which contained cigarettes from Liggett & Myers, this witness was unable to secure from the Bayonne Tobacco Company any further supplies of Liggett & Myers' products.

THE EXAMINER. Let the witness state facts without calling them spies.

By MR. SMITH:

Q. Was there more than one purchase of Liggett & Myers' products bought at that price during the life of the association?

A. Only one.

334 Q. When was that?

A. That was on September 15th that we received that shipment—no, September 19th we received that shipment.

Q. September 19, 1921?

A. Yes, sir.

Q. After this shipment which you received from the Bayonne Tobacco Company on September 19, 1921, did you receive any further goods from the Bayonne Tobacco Company—that is, Liggett & Myers' goods?

A. No, sir.

Q. Did you ever buy American Tobacco Company products at 10 and 1 during the period of the existence of the association?

A. We were not able to get the American Tobacco Company's goods, as they had a different price in Bayonne.

Q. Different to whom?

A. Of the jobber. They only had a discount of 7 and 2. The Bayonne Tobacco Company allowed each jobber 7 and 2.

Q. Bayonne, New Jersey, allowed its jobbers 7 and 2?

A. Yes, sir; while they allowed 10 and 2 here freight prepaid.

Q. Did they buy any products of Lorillard Company at any time during the period of the organization at any discount better than the maximum per cent agreed on by the association?

A. Yes, sir.

Mr. WALSH. Objected to, and I ask that it be stricken out as to what the American tobacco products sold at, at Bayonne.

335 Q. When did you receive those Lorillard products?

A. All during that time.

Q. At a discount better than 8 per cent or 7 per cent?

A. Yes, sir.

Q. Do you mind stating where you got those goods?

A. From three different parties.

Q. Were they Philadelphia parties?

A. No, sir.

Q. What kind of goods were they?

A. They were Camel cigarettes and Prince Alberts.

Q. What kind of goods were they as to condition or origin—were they fresh stock?

A. Perfect merchandise.

Q. Did you buy them from Philadelphia merchants?

A. We were not able to get any different price than the one which was fixed up by the association.

Q. That is the question I asked you. During the time the association was in existence in Philadelphia did you buy Lorillard products at any better price than the discount agreed upon by the association?

Mr. CALDWELL. I object to that question on the ground that it asks for Lorillard products. He is not competent as to what are Lorillard products. I have no objection to his stating what products he bought.

Mr. SMITH. It seems to me going pretty far if a man who has been in business so long does not know what products he bought.

336 The EXAMINER. Let him enumerate some of them.

A. I state we bought Camels and Prince Alberts.

Q. Are those Lorillard products?

A. Yes, sir.

(Objected to on the ground the witness don't know.)

(Objection overruled.)

The WITNESS. That was an error on my part; it was Reynolds.

Q. Do you know the brand of cigarettes manufactured by the Lorillard Company?

A. I honestly am a little twisted up on that, because there are so many different cigarettes that they have made.

Q. Let's have the names of the cigarettes that you bought?

A. The cigarettes?

Q. Let's have the names of the cigarettes that you bought at better than the prevailing maximum discount of the Philadelphia Tobacco Jobbers' Association in that period that they were in existence?

A. The ones we bought were Liggett & Myers.

Q. Let's have the brand rather than the manufacturers?

A. Fatimas, Piedmonts, Chesterfields, Recruits, and Camels, and Prince Alberts.

Q. Is Prince Albert a cigarette?

A. A tobacco.

Q. Of those brands of cigarettes did you buy all of them during the period of the existence of the association at a discount better than the prevailing maximum discount of the association?

Mr. CALDWELL. I object until he tells what he bought them at.

(Objection overruled.

Exception.)

A. I already mentioned Piedmonts, Fatimas, Chesterfields, Recruits, Camels, and Prince Alberts.

Q. Which of those brands was in the shipment you received from the Bayonne Company on September 19, 1921?

A. Those I have just mentioned.

Q. All of them?

A. Yes, sir.

Q. After the receipt of that shipment by you containing Fatimas, Piedmonts, Recruits, and Chesterfields, which of those brands did you continue purchasing from the Bayonne Tobacco Company?

A. Camels and Prince Alberts.

Q. Did you try to get Fatimas, Piedmonts, Recruits, and Chesterfields from the Bayonne Tobacco Company after September 19, 1921?

A. Yes; I tried very hard.

Q. Were you able to buy them?

A. No, sir.

Q. What reason, if any, did the Bayonne Tobacco Company give you for not selling you Fatimas, Piedmonts, Recruits, and Chesterfields after September 19, 1921?

(Objected to as calling for hearsay and not binding upon the Lorillard Company and immaterial as to the Lorillard Company and should not be received against the Lorillard Company.

(Objection overruled.

Exception.)

A. As soon as the shipments were made to us and it appears since those two men had taken down those two addresses.

Mr. WALSH. That is objected to. There isn't any evidence that two men took down the addresses.

The EXAMINER. Objection overruled. Proceed with the testimony.

(Exception.)

A. The Bayonne Tobacco Company were held off getting their goods for a certain time and then they were cut off from certain discounts. Instead of getting 10 and 2 they only received 7 and 2 at that time, for a certain length of time. I understand they are getting the full discount now.

Q. Do I understand you to mean to say that is the reason the Bayonne Tobacco Company gave you for not selling you Fatimas, Piedmonts, Recruits, and Chesterfields?

A. After this occasion on September 19, 1921; yes, sir.

Q. How often do you buy, in your business as a subjobber, cigarettes? Do you have standing orders or do you buy as the occasion requires?

A. In some cases we have standing orders. In other cases we pick up what we need extra.

339 Q. Are those standing orders weekly orders or monthly orders?

A. Weekly.

Q. And do you have those orders standing for every week of the year?

A. Yes, sir.

Q. How often do you turn your stock of cigarettes?

A. Our cigarettes are every week almost—in fact, twice a week, as far as that is concerned.

Q. Do you know how often the tobacco wholesalers of Philadelphia, buying direct from manufacturers, turn over their stock of cigarettes?

A. From my experience I think tobacco can be turned almost weekly.

Q. Do you know whether the tobacco wholesalers in Philadelphia, those who are on the direct list of the manufacturers and buy direct, have standing orders with the manufacturers?

A. As far as I know; yes, sir.

Q. What periods of time do those standing orders cover?

(Objected to.)

Objection overruled.

(Exception.)

A. I was told by more than one jobber they had weekly standing orders.

Q. And they turn over their stock weekly?

A. That is what they say, generally every week they get in a new shipment.

Q. Were there any goods besides Camels or Prince Alberts that you bought at better than the maximum discount prevailing
340 with the jobbers' association during the period they were in existence?

A. The only ones from whom we were able to get better prices on those goods were sub-jobbers in Philadelphia.

Q. You haven't answered my question?

A. That was my answer to that. We bought all the goods other than those off sub-jobbers.

Q. At better than the discounts given by the association—those you bought from sub-jobbers?

A. Yes, sir.

Q. On cross-examination yesterday it seemed to be attempted to show how impossible it was for you to make money at the prices at which you sell. Will you tell the examiner how your profits arise in the tobacco business at the prices at which you sell?

A. We simply figure on items that sell slowly and items that turn over fast. That is how we guide ourselves in fixing the price.

Q. That is you select the articles that you turn very fast?

A. Yes, sir.

Q. And sell them at a small profit?

A. Yes, sir.

Q. Do you have any other advantage in your business besides the quick turnovers?

A. Specials now and then.

Q. What are they?

A. Different gratises.

Q. What are they, please?

A. For instance, the Beechnut cigarettes on which there was a gratis of 35 cent a thousand during a certain period of 1921.

Q. What do you mean by gratis 35 cents?

A. The factory allows 35 cents to the jobber.

341 Q. If he buys in certain quantity?

A. No, sir; for a certain period, say, two or three weeks, or four weeks.

Q. What was the price per thousand at the time the manufacturers were allowing 35 cents per thousand?

A. If my memory serves me right they were \$6 a thousand, less the regular discount and an allowance of 35 cents a thousand.

Q. Do you know whether the wholesalers, members of the association of Philadelphia, also get special deals and allowances and gratuities from the manufacturers?

A. That I cannot say.

Q. Do you know whether these matches, which you testified on cross-examination you paid the Cunningham Company \$64 for or some similar amount, were purchased to the Cunningham Company gratis by some tobacco manufacturing company?

A. From my knowledge the Cunningham Company bought them from the Government.

Q. Do you know whether tobacco manufacturers furnish free to their wholesalers—that is, the wholesalers who buy direct—free matches?

A. I don't know.

Q. After September 19, 1921, did you write to the Bayonne Tobacco Company to find out why they were not shipping you Piedmonts, Chesterfields, and Fatimas?

A. Yes, sir.

Q. I show you a letter dated October 18th, 1921, addressed to the Bayonne Tobacco Company. Is that a copy of a letter you wrote?

A. Yes, sir.

342 Q. I show you a letter on the letterhead of the Bayonne Tobacco Company, dated October 19th, 1921. Is that the reply you received to the letter you wrote on October 18th?

A. Yes, sir; I also called them on the telephone.

Q. What reason did they give you over the telephone for not selling those brands of cigarettes about which I asked you?

A. What I testified before, that they held them back with the orders and then reduced the discount.

Q. That who held them back?

A. Liggett & Myers.

Q. Do you know whether Liggett & Myers manufacture Piedmonts?

A. Yes, sir.

Q. Manufacture Chesterfields?

A. Yes, sir.

Q. Manufacture Fatimas?

A. Yes, sir.

Cross-examination by Mr. CALDWELL.

Q. In reference to the special offer of 35 cents a thousand on Beechnut cigarettes, that was a general offer to all the jobbers and sub-jobbers—it was not limited to you alone?

A. No, sir.

Q. It was general to them all?

A. Yes.

By Mr. WALSH:

Q. Who conducts the Bayonne Tobacco Company?

A. Mr. Ozerarbitblit.

Q. Is he related to you?

A. Yes, sir.

Q. In what way?

A. His son married one of my nieces.

343 Q. Was he in this room yesterday—the old man with the whiskers?

A. Yes, sir.

Q. How long has he been in business?

A. To my knowledge I believe about ten years.

Q. He does a wholesale business in Bayonne?

A. Yes, sir.

Q. And you cooperate back and forth?

A. Yes, sir.

Q. Besides being relations you have business connections together?

A. Yes, sir.

Q. Is he in any way interested in your business?

A. No, sir.

Q. Financially?

A. No, sir.

Q. Or you in his, or your brother?

A. No, sir.

Q. Your cooperation comes about through your family relationship?

A. And also for business purposes.

By Mr. TAULANE:

Q. Is he still in business?

A. Oh, yes.

Q. Has he ever been through bankruptcy lately?

A. No, sir.

Mr. WALSH. This letter from the Bayonne Tobacco Company is signed by Carl.

A. That is his son.

Q. Whose son?

A. His son. He is with him in business and he is the one who really does all the buying and selling and so on.

Q. Do you know they got held up on some of their goods on account of credit?

344 A. Not to my knowledge. He was telling me he was asking them to send the bill of lading attached as that would be a better proposition for him.

Q. Send bill of lading with draft attached?

A. During the time the embargoes on the railroads, there used to be a certain time that he was not able to get goods for two or three weeks or so on, so he asked them to send the bill of lading attached so that he would not have to lay out the money in advance so far as his credit is concerned.

Q. The bill of lading was to be delivered when he paid the draft attached, is that what you mean?

A. That is what a bill of lading is for.

Q. I am asking you, is that what you mean?

A. As soon as I know what your question is. They send the bill of lading to him when he pays for the goods.

Q. That was his own request, is that what you mean?

A. Yes.

Q. And he requested the tobacco companies to sell him the goods that way, is that right?

A. That is right in this way: If we get goods from out of town and it takes that many days or weeks to get the goods and we get ten days we have to pay in advance, but we get the goods, and then naturally it would pay us to ask for a bill of lading attached.

Q. Is that what you mean he did?

A. Yes, sir.

Q. That was at the time his deliveries were held up?

A. No; he wasn't held up. His money was tied up.

343 Q. Could a jobber who bought that way turn his stock over every week?

A. Certainly.

Q. How?

A. A man gives a standing order and his order comes in every week. He gets his goods off and sells them and he is ready for the next week's.

JOHN L. MCANINLEY was thereupon called as a witness, and having been duly sworn, testified as follows:

Direct examination by Mr. SMITH:

Q. Mr. McAninley, where do you live?

A. 1732 North 61st Street.

Q. How long have you lived in Philadelphia?

A. All my life.

Q. What is your business?

A. Wholesale cigars, cigarettes, and tobacco.

Q. Where is your place of business?

A. 6006 Market Street.

Q. Philadelphia?

A. Philadelphia.

Q. How long have you been in business in that place?

A. At that address since last February.

Q. Prior to that time?

A. 3832 Market Street since January 10th, 1920.

Q. So that you have been in the tobacco business since January 10, 1920?

A. In partnership with Mr. Schoenfeld.

346 Q. In partnership with Mr. Schoenfeld?

A. Yes, sir; previous to that I have been with other firms.

Q. With whom were you connected before that?

A. I was with the 44 Cigar Company as a salesman for nearly two years and previous to that with Frings Brothers for almost eleven years.

Q. Frings Brothers are manufacturers, are they not?

A. Manufacturers and jobbers.

Q. Do you know which branch of their business is the larger part?

A. The jobbing end I should imagine.

Q. But you have been in partnership in the tobacco business since January 10th, 1920?

A. Yes, sir.

Q. Who is your partner?

A. Morris Schoenfeld.

Q. Has he been your partner since January 10th, 1920?

A. Yes, sir.

Q. What kind of a business do you conduct, you and Mr. Schoenfeld?

A. Wholesalers and retailers business, but our retail business is not very large—that is, not compared to the wholesale.

Q. Do you sell anything besides tobacco and cigarettes?

A. Cigars and pipes and other little specialties that belong to that trade—matches, chewing gum, and cards.

Q. Are you and Mr. Schoenfeld doing business under any trade name?

A. No, sir; just Schoenfeld and McAninley.

Q. Did you buy directly from any tobacco manufacturer?

A. Yes, sir.

347 Q. Who are the tobacco manufacturers you buy direct from?

A. The Tobacco Products Corporation, Lacas & Brother, Falk Tobacco Company, Philip Morris Company, Frismuth Brothers, practically all the independent or smaller concerns.

Q. Do you buy from the larger tobacco manufacturers?

A. No; not from Lorillard, or Liggett & Myers, Reynolds, or the American.

Q. I notice you used the word "independent" in describing Frismuth Company, Philip Morris and others. In that sense do you distinguish between the American, Liggett & Myers, Lorillard, and the Reynolds Company?

A. Well, we consider them as independent compared to the bigger companies.

Q. That is compared to the bigger companies such as the American, Liggett & Myers, Lorillard, and the Reynolds?

A. Yes, sir.

Q. When you commenced business in January, 1920, where did you obtain the products which you handled, which were manufactured by the American Tobacco Company and the Lorillard Company?

A. We bought first from Murphy Brothers in Camden.

Q. Did you buy from Murphy Brothers exclusively?

A. For the first month or so and then we bought from Blott, 41st and Lancaster Avenue.

Q. Do you know the brands made by the American Tobacco Company?

A. A few of them—Sweet Caporal cigarettes, Lucky Strike cigarettes, United States Marine tobacco, Five Brothers, Durham, Newsboy, Jolly Tar. That's the principal numbers that we use.

Q. Do you know the products made by the Lorillard Company?

A. Yes, sir.

Q. Name those please?

A. Sensation, Omega, Beechnut, Polar Bear tobaccos; Helmar, and Murad, and Mogul cigarettes. That would be about the principal numbers.

Q. Will you name the products of Liggett & Myers if you know them?

A. Piedmont, Chesterfield, Fatimas cigarettes and Granger tobacco. Duke's Mixture, I think that is about all.

Q. Will you be good enough to tell us the Reynolds Company products?

A. Prince Albert, Camel cigarettes, Apple tobacco, Schnapp, Brown Mule—those are the principal numbers.

Q. What discount from the manufacturers' list price did Murphy Brothers allow your firm in January, 1920?

A. Usually 10 per cent. On some occasions we get 10 and 1 on certain numbers.

Q. What discount did F. Blatt allow you when you commenced buying from him?

A. Just 10 per cent.

Q. I understand you bought from Murphy Brothers products of the American, Lorillard, Liggett & Myers?

A. Yes.

Q. How long did you continue getting 10 per cent from F. Blatt and Murphy Brothers?

A. Up until October 4th, 1920.

Q. There was a change of discount was there then?

A. Yes, sir.

349 Q. Did you buy exclusively from Murphy Brothers and F.

Blatt up to October 4th, 1920? I am speaking only of those products from the American Tobacco Company, Liggett & Meyers, Lorillard, and Reynolds?

A. Not exclusively. During that year we began to buy from the Franklin Tobacco Company.

Q. What did the Franklin Tobacco Company allow you?

A. Ten per cent.

Q. Are those three firms the firms you bought from in the period up to October 4th, 1920?

A. No.

Q. That is as to the American, Lorillard, Liggett & Myers, and Reynolds Company?

A. No; we bought some goods from other jobbers, too; from Mr. Narrigan in small quantities and, I think, from Fernani at different times.

Q. What discount did Fernani and this other firm you just mention allow you at that time?

A. Ten per cent.

Q. You were getting 10 per cent from all Philadelphia jobbers and from Murphy Brothers in Camden up to October 4, 1920?

A. Yes, sir.

Q. After October 4, 1920, did your firm continue to handle American, Lorillard, Liggett & Myers' goods, Reynolds' goods?

A. We did; yes, sir.

Q. What discount from the manufacturers' list price of those goods were you allowed on October 4, 1920?

A. From that day on we were only allowed 8 per cent—that is, from Philadelphia jobbers.

Q. Did you purchase the products of other manufacturers from these firms you have named in the period from January, 1920, to October 4, 1920?

A. We did.

Q. What discount did these Philadelphia jobbers and Murphy Brothers allow you on the other products that you purchased from January, 1920, to October 4, 1920?

A. The same discount—10 per cent.

Q. In other words, those discounts applied on all the goods you bought from these people?

A. Yes, sir.

Q. When the discount allowed you was 8 per cent off the manufacturers' list price, which I think commenced on October 4, 1920, who did you buy from?

A. We continued to buy the majority of our stuff from Franklin and from Blatt, but occasionally we bought from other sources other than Philadelphia jobbers.

Q. What were the other sources you bought from?

A. There was one sub-jobber in Philadelphia whose name I would rather not mention and another man who had previously been in the sub-jobbing business who got into the business at that time to supply Philadelphia jobbers and retailers at a better price than other jobbers were quoted.

Q. Why would you rather not mention the name of the other jobber?

A. We feel if an organization of this kind ever became effective again we would have to resort to the same sources.

Q. And these sources might not be available?

A. And these sources might not be available.

Q. Was there any difference in the discount allowed you by the Philadelphia jobbers after October 4, 1920, up to the end of 1921?

A. There was a change made during the year, 8 per cent to 7 per cent, with an allowance of $7\frac{1}{2}$ cents a thousand on cigarettes.

Q. In the period during which you were allowed a discount of 8 per cent—that is, from October 4, 1920, up to the time the discount was changed to 7—was there any difference in the discount from the manufacturers' list prices allowed you by the Philadelphia jobbers with whom you did business, or did they all allow you the same?

A. All allowed us the same discount.

Q. Did you endeavor to secure better discounts from Philadelphia jobbers than those you were then purchasing from?

A. We didn't buy from others than the ones we had been acquainted with previous to that time.

Q. Did you inquire from other jobbers what discounts from manufacturers' list prices they would allow you?

A. No; we inquired from other sub-jobbers what discounts they were getting, keeping in touch with other men in our business to find out what they were getting.

Q. What did you find?

A. Found out they were all getting the same.

Q. In the period from January, 1920, to October 4, 1920, where did you resell the tobacco products that you had purchased from the Philadelphia jobbers?

A. Well, the territory we covered was mostly suburban.
352 Within a radius of 8 or 10 miles of Philadelphia and in West Philadelphia and partly in the city of Philadelphia.

Q. To whom did you sell?

A. To retailers—small cigar stores.

Q. Did you make a profit on that business?

A. We made some profit, although it was considerably lessened.

Q. How did you make a profit in your purchases in selling to retailers the tobacco you had bought from jobbers in the period January, 1920, to October 4, 1920?

A. Goods we bought at a discount of 10 per cent we then resold to make a profit of 4; and sometimes cigarettes cost us \$10 less 10 (that would be \$7.20); we sold them at \$7.50, making a profit of 30 cents. In some instances we made more and in some instances we made less.

Q. Did you learn during that period what the small retailer, the trade you were selling, were paying to the Philadelphia jobbers?

A. Well, there wasn't any standard price. It depended entirely on the dealer himself. If he was wise and had a couple of jobbers competing for his business—that is, coming after his business—or if he was small and only had one jobber, he generally paid a longer price.

Q. Did you compete with the jobber for that business?

A. Generally; yes.

Q. And handled that business?

A. Yes.

Q. And did so at a profit, as you say?

A. Yes.

353 Q. I suppose that was because you sold to the retailer at less net price than the Philadelphia jobber did?

A. Well, not always on a basis of price. It was a question of service in a good many cases. In the suburban territory we covered places every week that the other jobbers might only go into once a month. We gave them regular delivery.

Q. Didn't you know you were getting a better discount from the jobber than that retailer was getting from the jobber?

A. Oh, yes.

Q. Was that condition peculiar to your business alone or was that the condition that applied to the business of all the sub-jobbers of Philadelphia?

A. Which condition do you refer to?

Q. That they sold to the small retailer and competed with the jobber for that business as you did?

A. I don't quite get the sense of that.

Q. Is the business which you have described as being yours the same kind of business as conducted by other tobacco dealers in Philadelphia who are known as sub-jobbers?

A. Quite the same except the instances where other sub-jobbers handle candy and we do not.

Q. You handle tobacco, cigarettes, and tobacco products to the exclusion of candy?

A. Yes, sir.

Q. You handle a general tobacco user's line?

A. That is right.

Q. What did you find with respect to the discount allowed the Philadelphia jobber—wholesaler to retailer, the small retailer
354 or the large retailer, as compared with the discount that the wholesaler allowed you—was it the same or was it different?

A. That was previous to October?

Q. No, after October 4th, 1920, or commencing with that date?

A. Commencing that date the retailers were all offered the same discount we were getting.

Q. Were they offered that discount of 8 per cent irrespective of quantity?

A. Irrespective of quantity.

Q. So that there was no opportunity for you or the other sub-jobbers to make any profit on your sales?

(Objected to.)

(Objection overruled.)

A. Well, where we had to compete with the other jobbers we generally lost the business except in such instances as where the other jobbers didn't cover the trade thoroughly, or where they had disputes about bills. We didn't sell to any dealer at 8 per cent. We made a profit on everything we sold, even if it was a small profit.

Q. But during all the period you were buying at 8 off, the retailer also was able to buy from the jobbers, member of the association, at the same discount?

A. Yes, sir.

Q. Did that condition apply to all the territory you covered in your sub-jobbing business?

A. Practically all except in such isolated places as the jobbers didn't care to cover.

355 Q. Did you do business in Camden?

A. No, sir.

Q. Any place outside of Philadelphia?

A. No.

Q. How many customers approximately, that is, retail customers, did you have at the time the discount was fixed at 8 per cent?

A. Between 375 and 400.

Q. After you found that you would be allowed no better discount by the jobber than the jobbers were allowing to retailers, what happened to those 375 customers?

A. Well, we lost quite a few of them outright, maybe 25 or 30. The others continued to buy in reduced quantities. There was a good bit of personality in the sales. A good many stuck to us with the expectation that this condition would be remedied and if things were anywhere near equal I could get a good share of the business.

Q. Was that because you had traveled a good many years?

A. I was covering this territory for a good many years, and I knew the retail trade well.

Q. You were friendly with many of them?

A. Quite friendly.

Q. You think that is the reason why many of them stayed with you?

A. That is the reason why many of them did.

Q. On that business you made nothing as I understand?

A. We always made some profit. We never sold without a profit. I would let the customer go before I would sell goods at cost.

Q. What, if anything, did you do to remedy the situation 356 you found yourself in and to remedy the situation you found the other sub-jobbers of Philadelphia in?

A. I called up several of the other sub-jobbers and arranged a meeting in our store to try and get the sub-jobbers together to form an organization and to buy direct, that is pool our money and buy in such quantities that they would ship direct.

Q. When did you call that meeting?

A. I think it was in September, 1920.

Q. Wasn't it in October, 1920?

A. It may have been. It was around that time.

Q. How many did you get together?

A. Sixteen or twenty, I am not sure which.

Q. And you endeavored to get them to agree to buy from the same jobber?

A. We had several plans arranged. One was that we should all buy from one jobber to the exclusion of all the others with the hope that that would break the association.

Q. What was the basis of that hope?

A. So that the jobbers who had been getting some of the business would be sore because they were losing business.

Q. You felt if you all bought from one jobber it would break the organization?

A. Yes; but it didn't go through.

Q. Why?

A. Because a good many of the sub-jobbers were small and tied up financially and tied up with jobbers from whom they bought and could not get away from them.

Q. Then what, if anything, did you and the other sub-jobbers do?

A. We wrote a letter to Hill, president of the American Tobacco Company.

357 Q. Do you have a copy of the letter you wrote to Mr. Hill?

A. I think so. [Witness produces letter.]

Mr. SMITH. Mr. Examiner, the witness has handed me a paper which appears to be a carbon copy of a letter dated October 29th, 1920, addressed to Mr. Percival S. Hill, 111 5th Avenue, New York. I would like to have this letter marked for identification at this time. (Letter marked "Exhibit 13," for identification.)

Q. Mr. McAninley, is this paper which has been marked "Commission's Exhibit No. 13," for identification, a letter sent by you and others sub-jobbers of Philadelphia who are named on the third sheet?

A. That is the original duplicate that I made at the time.

Q. You made this duplicate yourself?

A. Yes, sir.

Q. Did you mail it to Percival S. Hill, 111 5th Avenue, New York?

A. Yes, sir.

Q. Who is Percival S. Hill?

A. The president of the American Tobacco Company.

Q. I notice that the signature is "Yours respectfully, The Sub-Jobbers of Philadelphia, per." Who signed the petition of the letter underneath the word "per"?

A. I signed it.

Q. Did you affix any title to your name?

A. No, sir; just my name.

Q. On the third sheet of this letter appear the words, "The following sub-jobbers join in this petition" followed by the names. Did those sub-jobbers whose names appear in those places sign the letter or were those signatures in the original letter to Mr. Hill typewritten?

A. They were typewritten.

Mr. SMITH. This letter, Mr. Examiner, I offer in evidence and ask that it be marked "Commission's Exhibit No. 13."

Mr. WALSH. Objected to. I don't know of the existence of any such letter but I will take up the matter of verification and will reserve the right to object after I get the facts.

(Letter received in evidence and marked "Exhibit 13.")

Q. Do I understand you mailed the original of this letter?

A. Yes, sir.

Q. Put it in the mail yourself?

A. I did.

Q. Was the original of which this Exhibit 13 is a copy, sent to Mr. Hill on the letter-head of Shoenfeld and McAninley?

A. Yes, sir.

Q. That letter gives the address of Shoenfeld and McAninley as 203 Market Street, Philadelphia, does it not?

A. Yes, sir.

Q. What reply, if any, did you receive from Mr. Percival S. Hill in answer to the communication which has been admitted in evidence as commission's Exhibit No. 13?

Mr. WALSH. I object to the reply because there is no evidence that the letter was ever received by Percival S. Hill.
359 Neither has there been the foundation laid for the introduction of the letter itself in evidence.

Mr. SMITH. There is a legal presumption that when you prove the writing and the mailing or the depositing of a letter in the mail that that letter has been received by the parties to whom it is addressed. That is the only reply I desire to make to the objection.

THE EXAMINER. Proceed.

A. I didn't receive any answer or acknowledgement whatever.

Q. Did you receive any answer or acknowledgement of any kind from anybody of the American Tobacco Company?

A. No, sir.

By the EXAMINER:

Q. Was the letter ever returned to you?

A. No, sir; it had a return address on the envelope so that it would come back if it had not been received.

Mr. SMITH. I would like to read the letter into the record at this time.

Mr. WALSH. With the permission of the examiner, I reserve the right to object to its introduction; subject to its verification, if it is ascertained Mr. Hill did receive the letter, we will take up the withdrawing of the objection.

360 THE EXAMINER. It can be stricken from the record later as well as now. The letter has been received, and my official permission is given to insert it in the record.

Q. After writing this letter known as commission's Exhibit No. 13 to Mr. Hill of the American Tobacco Company, what, if anything, did you and any other sub-jobber of Philadelphia do or attempt to do to help yourselves?

A. One or two others, Mr. Shatz and Mr. Cohen and, I think, there was another one, Mr. Abramson, and myself. We were appointed a committee by all the jobbers to do what we thought best to further the interests of the sub-jobbers. I think we called on Mr. Eberbach at one time. I think Mr. Cohen and myself were there.

Q. Who is Mr. Eberbach?

A. Head of the firm of Cunningham.

Q. He was president of the wholesale association.

A. Yes, sir.

Q. One of the respondents in this case?

A. Yes, sir; we urged on him to change the discount between the sub-jobbers and what was being given to the retailers. He didn't give us any satisfaction, and would not promise us anything or say when anything would be done. He said all these things would be gone over slowly and would take some months to get there.

Q. Did you and the other sub-jobbers prepare a letter for the wholesale tobacco dealers association?

A. Yes, sir; we did. We sent a letter to them, too.

361 Q. Did you hand that letter to Mr. Eberbach?

A. No; I think that letter was mailed to him. I don't just remember on that.

Q. You have a copy of that letter with you?

A. Yes, sir. [Witness produces letter.]

Mr. SMITH. This copy, Mr. Examiner, I offer in evidence and ask it be marked "Commission's Exhibit No. 14."

Mr. CALDWELL. I object to it as against the Lorillard Company. It has no bearing upon us. We are not a party to it in any way.

Mr. SMITH. Mr. Examiner, of course this letter will be binding finally upon the Lorillard Company if it is not later shown that the Lorillard Company was in conspiracy with the parties in the complaint.

Mr. TAULANE. I object to it on the ground that the law is well settled how to prove the mailing of a letter. He can't offer in evidence the mailing of a letter until first he calls on the other side to produce the original, and if the original copy is not produced then you have to prove by competent evidence that the letter was mailed by some one.

The EXAMINER. I will admit this letter with the understanding that the original, if it can be produced, will be produced and substituted for it.

362 Mr. TAULANE. I object on the ground there has been no evidence that the letter was either mailed or delivered.

(Objection overruled.)

(Exception.)

Q. Do you know whether the original of commission's Exhibit No. 14 was handed by you to Mr. Eberbach or whether it was mailed to Mr. Eberbach?

A. At this day I can't say definitely whether it was mailed or handed to him.

Q. Do you know whether the original of commission's Exhibit 14 was received by Mr. Eberbach?

A. I have this knowledge, that a member of the association told me after the jobbers' meeting it was read to the association at the full meeting.

Q. At what meeting?

A. Meeting of the jobbers' association.

(Objected to by Mr. Taulane.)

(Objection overruled.)

Q. That this copy, or rather this Exhibit 14, has attached a paper, quite a typewritten list of names. What connection, if any, did that typewritten list of names have with the substance of this paper known as commission's Exhibit 14?

A. It was to indicate the sub-jobbers were responsible, who were putting forth that letter.

Q. Was the original of commission's Exhibit 14 signed by the parties appearing on the list of names attached to the exhibit?

A. No; I signed that personally with my own name.

Q. Do you know whether Mr. Eberbach or any other of the Philadelphia jobbers knew the names of sub-jobbers who were members of the sub-jobbers association?

A. I have no knowledge that they knew other than they might read the list I had put there and they might have their own list of sub-jobbers.

Q. With the original of Exhibit 14 you transmitted to Mr. Eberbach and to the jobbers organization of Philadelphia a list of the names of members of the sub-jobbers organization?

A. That was those sub-jobbers who came to the special meetings I called.

Q. And those names you gave to Mr. Eberbach and to the organization in this commission's Exhibit No. 14?

A. Yes, sir.

Q. Did you receive any communication from the Wholesale Tobacco Dealers' Association of Philadelphia in reply to the original of that paper which is known as commission's Exhibit No. 14?

A. No; we received no answer.

Q. On the date of the sending of that letter—that is the day of April 2nd, 1921, what was the discount being allowed to you by the jobbers of Philadelphia from whom you were purchasing?

A. At that time it was 8 per cent.

Q. When did the jobbers of Philadelphia change their discount rate to your firm from 8 per cent?

A. Well, I am not sure what date, but it was some time shortly after that—possibly a month or two months. I am not positive of that. I could look it up.

Q. What was the change?

A. The discount was changed to 7 per cent with an allowance of $7\frac{1}{2}$ cents a thousand for cigarettes when bought in quantities of ten thousand or more.

Q. Was there any difference in the discounts allowed you by the Philadelphia jobbers from whom you purchased when the discounts changed from 8 per cent to 7 per cent with the variation you mentioned—did all the jobbers allow you the same discount of 7 per cent?

A. The two or three from whom we were buying at that time allowed us the changed discount at the same time.

Q. They all changed at the same time?

A. Yes, sir.

Q. And when they changed their discounts were they all exactly alike?

A. Yes, sir.

Q. Do you know what the other jobbers in Philadelphia were allowing as discounts at that time?

A. Only what we heard from the other sub-jobbers with whom we kept in touch at the time, they all had changed it to 7 per cent which we were getting with 7½ cents allowance.

Q. So that the relief you got from the Philadelphia Tobacco Jobbers Association was not a relief, but rather an aggravation when they changed the discount from 8 per cent to 7 per cent?

A. Whether that was an answer to that letter we don't know, but that was the condition at that time.

Q. The condition became worse?

A. Yes, sir.

Q. And you were allowed only 7 per cent?

A. Yes, sir.

365 Q. Do you know one Mr. Max Newman of the Lorillard Company?

A. Yes; very well.

Q. Who is he?

A. He is in charge of one of the departments of the Lorillard Company here, I believe—smoking tobacco.

Q. Do you know the territory he covers?

A. I am not so sure of that. I know he covers Philadelphia territory and possibly other territory.

Q. Is he connected with that department of the Lorillard Company which sells the goods you handle?

A. We handle the goods of which he is the agent; yes.

Q. Did you have a talk with Mr. Max Newman and with other sub-jobbers of Philadelphia on any occasion?

A. We never had Mr. Max Newman at any meeting of the sub-jobbers, but I have talked to him on several occasions.

MR. CALDWELL. I object to any statement of Max Newman until we have the time and the place and also his scope of authority to speak for anyone.

A. Of course, I can not remember any particular date on which I met him. He came into the store on an average of once or twice a month. It was during the time of the existence of the tobacco jobbers' organization; I am sure of that.

Q. Did you ever talk with Mr. Max Newman in the presence of other sub-jobbers?

A. I can't say that I have, that I remember.

366 Q. Do you know Mr. Dandy of the Lorillard Company?

A. Yes; I met Mr. Dandy at one time with Mr. Newman.

Q. Do you know what department of the Lorillard Company he has charge of?

A. He has charge of the smoking tobacco.

Q. He is the gentleman sitting at my right?

A. Yes, sir.

Q. He has been sitting here for the last several days?

A. All day yesterday I saw him.

Q. When did you talk with Mr. Dandy?

A. It was some time during the winter, early in 1921, because it was cold weather, but I could not tell you the date.

Q. What was your conversation with Mr. Dandy?

Mr. CALDWELL. I object to that. First he must show what Mr. Dandy's authority is. His testimony is incompetent.

(Objection overruled.)

The EXAMINER. Proceed, gentlemen.

A. We talked in a general way about the conditions under which the sub-jobbers were working at that time. Mr. Dandy expressed a great deal of friendly feeling toward us and assured me he would do all in his power to help us, without making any definite promises.

Q. What did he say?

A. He said, among other things, that if the condition was not remedied the Lorillard Company would consider distributing products in Philadelphia themselves and each little jobber could go and get his direct.

367 Q. Do you remember anything else Mr. Dandy said?

A. Not off hand—there was another thing too, that was brought up at that time, but I am not sure whether Mr. Dandy said it or whether Mr. Newman said it.

Mr. CALDWELL. I object.

Q. Was Mr. Newman present at the time you had the interview with Mr. Dandy?

A. He was.

Q. Was it this interview you had in mind when you say you were not sure whether Mr. Dandy or Mr. Newman made the statement you are about to testify to?

A. I could not say for sure which it was.

Q. Was it at this interview you are about to testify to?

A. Yes. If it wasn't at this interview it would not be Mr. Dandy because I only met him one time with Mr. Newman.

Q. Will you state what that was?

A. He told me if we would establish ourselves outside of Philadelphia, he mentioned one place—Arlmore, on the main line—as a possible place, we would most likely be put on the direct list of the Lorillard Company. He didn't make any direct promise to that effect.

Q. Direct list of who?

A. The Lorillard Company.

Q. What is your best recollection, Mr. McAninley, as to which one of these gentlemen made the statement?

A. I think it was Mr. Newman. I feel more positive it was Mr. Newman.

368 Q. If it was made by Mr. Newman it was in the presence of Mr. Dandy?

A. I am not sure of that, but I met Mr. Newman several times, but I am more confident that it was Mr. Newman than Mr. Dandy. I only met Mr. Newman one time when Mr. Dandy was present.

Q. What reason did either of these gentlemen give for the suggestion if you establish yourself at Ardmore you might be put on the direct list of the Lorillard Company.

(Same objection.)

(Same ruling.)

A. We would be outside of the territory that was governed by the jobbers' association at that time.

Q. What did he say in that connection?

A. Of course I don't remember. The thing looked impossible to me at the time. I could not afford the expense of getting a place out there and moving out of our territory and giving up my business here.

Q. What did he say about the jobbers' organization in that connection and for his reasons for your establishing yourself outside of Philadelphia?

(Objected to.)

(Objection overruled.)

A. I can't say his exact words. I thought——

(Objected to.)

369 A. I know the substance of what he said. He said we would be outside the jurisdiction of the Philadelphia Jobbers' Association and we would have a better chance of getting on the direct list of their company and of other companies as well as better off.

Q. Did he say why you would have a better chance of getting on the direct list?

A. No; he didn't state definitely.

Q. What, if anything else, did Mr. Newman or Mr. Dandy say to you about the jobbers' organization of Philadelphia?

(Same objection.)

A. They thought it was very hard on us fellows and they professed a very friendly feeling towards us little fellows because Mr. Dandy had known my partner for years before, and Mr. Newman had known me for a good while, and we had always helped them in the distribution of their product, if they brought out a new article we endeavored to sell it for them.

Q. The suggestion was if you went outside of Philadelphia you might be put on the direct list of the Lorillard——

(Objected to.)

(Objection sustained.)

(Question withdrawn.)

Q. Was it before or after this interview you had with Mr. Dandy that the jobbers' association changed their discount rate to you?

370 (Objected to.)

(Objection overruled.)

A. The change of discount was made quite a long time after that, because this was in the winter time I met Mr. Dandy and the change in date occurred some time in June or the early summer.

Q. Did you and Mr. Cohen at any time visit Mr. Eberbach of the jobbers' association?

A. We did.

Q. What did you visit him for?

A. To arrange some arrangement that would allow the subjobber a discount over the rate allowed to the other dealers.

Q. Did you write a letter to Max Newman of the Lorillard Company regarding this visit you and Mr. Cohen made to Mr. Eberbach?

A. I did at that time, I think.

Q. Did you have a copy of that letter with you?

A. Yes, sir.

(Letter dated February 9, 1921, produced by witness, addressed to Mr. Max Newman.)

Q. Is this paper you have given me a true carbon copy of a letter written by you February 9, 1921, to Mr. Max Newman of the Lorillard Tobacco Company?

A. Yes, sir.

Q. Was that letter delivered personally to Mr. Max Newman?

A. Mailed to him.

Q. Who mailed it?

A. I mailed it.

371 Mr. SMITH. Mr. Examiner, I offer this letter in evidence, and ask that it be marked "Commission's Exhibit No. 15."

Mr. CALDWELL. That is objected to, as there is no proof it was ever received by Mr. Newman, and on the ground that there is no proof that Mr. Newman ever had any authority to consider any of the subjects mentioned in the letter, and on the ground that the original letter, if there is an original letter, has not been called for, and on the ground the letter itself is incompetent, irrelevant, and immaterial.

Mr. TAULANE. Same objection.

The EXAMINER. Objection overruled. Letter admitted. (Exception granted.)

Q. Was that letter ever replied to by Mr. Newman?

A. I was speaking to him after that time and he told me he had received it.

Q. How often did you meet Mr. Newman?

A. Sometimes once, sometimes twice a month.

Q. Are the statements of fact contained in that letter known as commission's Exhibit 15 true?

Mr. CALDWELL. That is improper to ask for such a conclusion. That letter is a page and a half to two pages long.

Mr. SMITH. It seems to me that can be covered in one general question.

The EXAMINER. The respondent's attorney can take it up on
372 cross-examination and divide it up. I will let it go in in that way.

A. To the best of my knowledge and belief every statement therein is correct.

Q. When your discount from your Philadelphia jobbers was 8 per cent, do you know what discount the jobbers of Philadelphia were allowing to bootblack stands and such small places at that time?

A. At that time they were allowing everybody the same discount.

Q. Was there any change in the activities of the whole Philadelphia wholesale tobacco and cigar dealers with respect to the country retail trade after the maximum discount was fixed at 8 per cent?

A. They were not as active in the country districts as they were in town, but it was only a short time afterwards that the 8 per cent was gradually extended to the country trade.

Q. Did the jobbers then go after that trade?

A. They did the same as the city trade.

Q. The trade that had been served by sub-jobbers before?

A. It was served by jobbers, too. We covered it the same as some other jobbers did.

Q. Do you know Murphy Brothers, of Camden?

A. I know them; yes, sir.

Q. Do you remember having a talk with either of those gentlemen after the association was formed?

A. No; not personally. As a rule I am on the outside all the time, and my partner attends to the buying, and he comes in contact with their salesmen or whoever comes from there.

Q. Did you, yourself, have any conversation with Murphy Brothers or their salesmen shortly after the association was formed?

A. No; I may have talked to Mr. Osbourn at the time, but it would only be a few words.

Q. Do you ever remember giving an order to Murphy Brothers?

A. My partner did.

Q. When was that?

A. Sometime after the jobbers' association was formed. He told me this as it happened. He gave them an order when their representative offered him 10 per cent.

Q. When was that?

A. That was around May or June, 1921, but I am not sure of the date.

Q. What was the size of the order?

A. A large order, pretty nearly our weekly order, around \$2,000.

Q. And that order allowed you 10 per cent from the manufacturers list?

A. Yes, sir.

Q. What was that order for?

A. That order was never delivered.

Q. Do you know why?

A. We have no definite knowledge other than what we gained from other sub-jobbers.

Q. What are the names of the other sub-jobbers who gave you the information upon which you based your opinion?

A. Mr. Mike Cohen.

Q. Did you say Mike or Max?

A. Michael, and Mr. Shatz.

374 Q. Who is Mr. Shatz?

A. He is a sub-jobber like myself. Those two and myself always kept in touch with one another during all this time.

Q. Do you know Mr. Gordesky, of the Franklin Tobacco Company?

A. Yes, sir.

Q. That is the company to which you gave the bulk of your business in 1921?

A. Yes, sir.

Q. Did you talk with Mr. Gordesky of the discount being allowed to you by his company?

A. On quite a few occasions; yes, sir.

Q. What did he say on any one of those occasions about the discount?

A. He told us that the discount would ultimately be fixed so that we would have a fair margin over the discount allowed to dealers. He didn't promise us anything definite.

Q. When did he tell you that?

A. Before the organization was formed and for quite a few meetings after it was formed. The organization was formed on October 4th and he told us at that time by the first of the year the sub-jobbers would get 8 per cent and the other dealers maybe 5. He wasn't sure of any exact amount.

Q. Did you ask Mr. Gordesky why you were allowed by his company 8 per cent off the manufacturer's list for a better discount?

A. We tried every way in our power to get him to give us a better discount.

Q. Did you get a better discount?

A. No.

Q. What reason did he give you?

A. That was the rate allowed by the association and there would be no variation from it at that time.

375 Q. What else did he say about the association?

A. He said they could not afford to allow any different discounts. They would all have to give the same discount.

Q. Did he say why?

A. The chances were they would be cut off from the list if they did.

Q. Off whose list?

Mr. CALDWELL. Objected to as not binding on the Lorillard Company and as being hearsay.

(Same objection on the part of the American Tobacco Company.)

The EXAMINER. It is not binding upon the Lorillard Company.

Mr. SMITH. Do I understand the ruling on that to be that it is not binding now, but if we later establish the conspiracy of the

Lorillard Company and the American Tobacco Company with the jobbers' association it will be permitted to stand and be binding?

The WITNESS. He said it would be very likely anybody in the organization that would give a better rate of discount would be cut off the American Tobacco Company's list and the Lorillard Company and the Liggett Company.

Q. Did he say anything else in that same connection?

A. Not that I remember just now.

376 Cross-examination by Mr. TAULANE:

Q. What discount are you getting now?

A. Ten, and sometimes a little better.

Q. How long have you been getting that rate of discount?

A. Since January of this year.

Q. Do you know when this association went out of business or ceased to function?

A. About that time.

Q. About December, 1921, or January, 1922?

A. Yes, sir.

Q. From the time the organization started until January 1st, 1922, did you ever buy any of your goods with a larger discount than 8 per cent?

A. You mean from Philadelphia jobbers?

Q. Yes.

A. No; we bought from other than Philadelphia jobbers at larger discounts.

Q. You mean outside of Philadelphia?

A. Not outside of Philadelphia, but other sources than the Philadelphia jobbers.

Q. What sources?

A. I mentioned one sub-jobber before, and from another man who was previously a sub-jobber and who devoted himself to the business of buying just certain brands of cigarettes and selling to the sub-jobbers and retailers at 10 per cent discount.

Q. What discount did you get before the organization was formed?

A. Ten, and sometimes 10 and 1.

Q. Did you every buy goods from the Cunningham Company?

A. Yes, sir.

Q. Did you ever get more than 8 per cent on those goods any time?

377 A. No; we never got any more than 8 per cent on staple goods from Cunningham. So far as Cunningham was concerned, we bought mostly specialties from them.

Q. But so far as Cunningham was concerned the organization had no effect on the discount you received from that company?

A. Our purchases from them consisted more of pipes and specialties.

Q. Anyhow, before the organization was formed, 8 per cent was the discount you received?

A. Yes, sir.

Q. Then I understand the grievance of the sub-jobbers was not the rate of 8 per cent?

A. That wasn't our grievance.

Q. That didn't concern you, it made no difference to you whether they fixed the discount at 10, 9, or 8?

A. No; we didn't care if they allowed us a margin.

Q. What you wanted them to do was to discriminate between you and your associates whom you call the sub-jobbers and the retailers as to discount?

(Objected to by Mr. SMITH. That question is not testified to. The sub-jobber, according to the testimony of this witness buys in large quantities, and the bootblack stand and corner retail tobacco store buy in much less quantities. If it is a discrimination to allow a better price to one buying larger quantities than one buying smaller quantities, I have never learned of any such proposition in the law.

Objection overruled.)

378 Q. That is right, isn't it?

A. That is right.

Q. There are some retailers in Philadelphia who purchase in larger quantities than many of these so-called sub-jobbers?

A. I think there are some of these larger cut price stores.

Q. In your talks with the association did you and your associates attempt to arrange with them what the difference in the discount should be?

A. We never stated any definite arrangement. We asked that some arrangement be made that would be satisfactory to them, so that we would not be discriminated against.

Q. Before the association went into operation, didn't the large retailers get the same discount as sub-jobbers?

A. I don't know that.

Q. From your experience or knowledge of the business?

A. No; I know some of them got 8 and some of them got 9, and whether some of them got 10 I am not sure. As a rule the sub-jobber would always consider more entitled to the 10 per cent than the cut price retailer.

Q. Take before the association was formed. You say the usual rate of discount to sub-jobbers such as yourself and associates was 10 per cent?

A. Yes, sir.

Q. Do you know what these jobbers in Philadelphia sold to the retail trade at—what discount the cut price stores got?

A. Of course I don't know what prices they gave to these cut price stores from my own knowledge. I know some of them in the territory I covered admitted they got 7 per cent, some said
379 they got 8 per cent. Previous to the formation of the jobbers' organization in the territory I covered, we got better than 8.

Q. In the territory you covered—what territory was that?

A. Mostly West Philadelphia and the suburban territory.

Q. They would be most of them small purchases?

A. Some of them were fairly large. I would not liken them to the big stores on Market Street.

Q. Do you know of your own knowledge what they did get from the jobbers?

A. I know none of them I was acquainted with got better than 8 per cent.

Q. Don't you also know as a matter of fact lots of them didn't get that?

A. Many of them didn't get that.

Q. And after the association many of these small retail fellows didn't get 8 per cent or 7 per cent?

A. After the association was formed the jobbers catered practically to everyone at that same price.

Q. I asked you whether or not all these small retailers in your territory received many of them less than 8 per cent or 7 per cent discount after the association was formed?

A. I could not say definitely, but those catered to by the big jobbers admitted they were offered 8 per cent.

Q. Your conferences with the wholesale jobbers' association and your other conversation had a twofold purpose. That is to say that the sub-jobbers should get larger discounts than these retailers should get and secondly that jobbers should keep off selling 280 retailers and give the sub-jobbers a chance at the business?

A. No; every man has a right to go after all the business he can get. We had to do that; we had to take somebody's trade, and I feel they had a right to go after ours.

Q. That was not one of the grievances you had?

A. No.

Q. But you did, however, want the wholesale jobbers' association to give sub-jobbers a larger discount than they did retailers?

A. We did.

Q. That is what you wanted?

A. Yes, sir.

Q. That was the only object you had in view?

A. That was our main idea.

Q. You associated yourselves together and formed an association?

A. We tried to but never succeeded.

Q. And you were perfectly willing to agree on any uniform price or amount of discount if you could have made the arrangement with the wholesale jobbers' association?

A. Yes, sir; we would have agreed to anything.

Q. If they had set any?

A. Yes.

Q. If you got 7, 8, 9 per cent you would have tried to persuade all the other members of the association to abide by it?

A. Yes, sir.

Q. Did you also have any rule in your organization of the discount you would allow the retail trade?

A. No; we never got that far.

Q. Was that contemplated at the time?

A. No, sir.

Q. And while of course you were not benefitted by the
381 wholesale jobbers' association it did benefit the retailer. It gave them an advantage they didn't enjoy before in the way of price?

A. Yes.

Q. Having that advantage in price, it benefitted the ultimate consumer while the association was in operation?

A. If you can call it a benefit. It was partly responsible for this price-cutting war existing in this city at the present time, and if price cutting can be considered an advantage then it was an advantage.

Q. It was an advantage in giving the consumer cheaper cigarettes?

A. To that extent it was.

(Adjourned for lunch until 2 p. m.)

Docket No. 886

PHILADELPHIA, *October 19, 1922.*

Met pursuant to adjournment 2 p. m.

Before GEORGE MCCORMICK, examiner.

Appearances: Mr. Taulane, Mr. Caldwell, and Mr. Walsh, for respondent; Mr. Smith and Mr. Haas for the commission.

382 JOHN L. MCANINLEY resumes the stand and further testifies as follows:

Cross-examination by Mr. CALDWELL:

Q. Mr. McAninley, did you receive from Max Newman any reply to the letter from you dated February 9, 1921, commission's Exhibit 15?

A. No; I did not receive a written reply.

Redirect examination by Mr. SMITH:

Q. Mr. McAninley, how do you deliver the tobacco products which you sell?

A. By truck—motor truck.

Q. Do you store the goods which you purchase from wholesalers and resell to retailers?

A. We do.

Q. Is that an item of expense to you?

A. No; we have our storage space right in the store where we operate.

Q. That is an expense to you, however?

A. Yes, indeed.

Q. You have the expense of delivery and the expense of handling?

A. Yes; and the expense of soliciting.

Q. And the expense of storage?

A. Yes.

Q. What other expenses do you have?

A. The ordinary overhead that goes with every business, expenses and cost of help.

Q. Do you extend credit to your retail customers?

A. To the dealers that we sell to, or to our retail customers in the store.

383 Q. I mean retail dealers.

A. Yes, sir; generally extend weekly credit.

Q. Did the retail tobacco stores which were purchasing from jobbers get the same discount you were purchasing at deliver the merchandise to their customers or are those goods delivered over the counter?

A. Do you mean the jobbers we compete with?

Q. No; I will repeat the question. Did the retail tobacco stores which were purchasing from jobbers get the same discount you were purchasing at deliver the merchandise to their customers or are those goods delivered over the counter?

A. They are delivered over the counter.

Q. They don't have the expense of delivery and those other items of expense you do?

A. No.

Q. Or similar items of expense which other sub-jobbers have?

A. They don't have that expense. The retail business has not that expense.

Q. In other words, the retail tobacco stores don't have the expense which the sub-jobbers have in the resale of their product?

A. That is right.

Q. On your cross-examination you used the word discriminate or discriminated and said you had been discriminated against by the wholesale tobacco dealers of Philadelphia. What did you mean when you said you were discriminated against?

A. In this sense: Previous to the organization of this jobbers' association we had always enjoyed a sub-jobbers' discount, 384 usually 10 per cent. That is the discount that was better than that given to the retail dealers, and upon the formation of the organization we were not given that discount. We were only put on the same plane as the retail dealers.

Q. And you thought you were discriminated against because you bought larger quantities than retailers who were allowed the same discount. You were not allowed any better discount by the jobber?

A. That we were not allowed a proportionate profit that we were entitled to.

Q. Or a difference in price from the smaller purchaser?

A. That's it.

Q. You said on your cross-examination that you thought the possible effect of the organization upon the tobacco jobbers' association was the reduction of the price to the consumer. Has there been a price war in Philadelphia on tobacco in the last couple of years?

A. There has; yes.

Q. How long has that been going on?

A. It is hard to tell when it started, but it has been going on since the war in a very lively fashion.

Q. Going on prior to October, 1920?

A. Yes. I would say it has.

Q. Prior to the organization of the tobacco jobbers into this association?

A. Yes; I would say that it has.

Q. Do you know which class of retailers started the cut price war on tobacco products in Philadelphia?

A. That is hard to tell. Of course I guess it really originated in the central part of the city, among the large retailers.

385 Q. Chain stores?

A. Not particularly the chain stores. Those individual dealers who were probably trying to get their competitors' business and undersell them.

Q. That was all before the organization of the association?

A. That started long before and has continued up to this time, and is still continuing.

Q. So that the consumer has been getting tobacco products and cigarettes at a remarkably low price in Philadelphia?

A. Yes, sir, for quite some time.

Q. The organization of the tobacco jobbers' association didn't bring about that result?

A. It may have contributed some, but I don't think it was responsible for that.

Q. If the sub-jobbers of Philadelphia had been getting better discounts from the jobbers since the organization of the jobbers into an association, isn't it a fact that the retail customers—and I am not speaking of retail dealers—customers of the sub-jobbers would be also getting an advance?

A. They would. We would have been able to sell them much cheaper if we had been getting a full discount.

Q. Have you been prevented from giving better terms to the dealer because of the activities of the association?

A. We have; yes.

Q. Were cigarettes and tobacco products sold cheaper to the consumer during the organization of the tobacco jobbers into this association than they were sold to the consumer before the organization?

386 A. Well, they were, but it was due to reduction in price by the manufacturers rather than through any operation by the tobacco jobbers' association.

Q. When were the prices lowered—during the organization of the jobbers or before the organization of the jobbers?

A. It was during the operation of the jobbers' association.

Q. That was because the manufacturer reduced the price?

A. Yes, sir.

Q. Do you know if any subjobbers went out of the sub-jobbing business during the existence of the association of wholesale tobacco dealers?

Mr. CALDWELL. I object to that. They may have gone out of business for a great many reasons. It is immaterial.

Mr. SMITH. I am asking him whether he knows anyone went out of business.

The EXAMINER. The objection is overruled. Proceed to answer.

(Exception allowed.)

A. I know of one case where a sub-jobber gave up the business.

Q. Do you know of any other case where the sub-jobber went out of business during the life of the association?

A. Not that I could say.

Q. How many sub-jobbers are there in Philadelphia in tobacco?

A. The ones we consider the sub-jobbers I think numbered about 22.

Q. What are the qualifications of a tobacco dealer which you have in mind by which you classify him as a sub-jobber?

287 A. We considered the dealer who had a salesman or more on the street, that delivered his sales and did a wholesale business rather than a retail business was a sub-jobber.

Q. Does he necessarily have to conduct only a wholesale business?

A. No; we didn't think that was necessary, because nearly all the sub-jobbers have a retail department.

Q. Do you know whether any of the Philadelphia tobacco jobbers buying direct from the American, Lorillard, Liggett & Myers, or Reynolds Company, or more than one of them, conduct also a retail branch of the tobacco business?

A. You mean do they conduct a retail branch separate from their wholesale business?

Q. Whether it is separate or conducted with it, do they sell at retail?

(Objected to by Mr. Caldwell as a very indefinite question.

Objection overruled.

Exception allowed.)

A. I do know several that do.

Q. Who are they?

A. Mr. Blatt at 41st and Lancaster Avenue, I think Shipton & Payne and Brucher & Boghem, and that's all I can think of off hand that I know have a retail calendar in their places of business.

Q. And you know those firms buy direct from one or more of the four large manufacturers?

A. Yes, sir.

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Cross-examination by Mr. TAULANE:

Q. The overhead of the retail dealer for the same volume is much heavier than a sub-jobber?

A. I think not.

Q. He doesn't have to maintain delivery trucks?

A. No; he doesn't have to maintain delivery trucks; he doesn't have to go out and solicit business.

Q. Doesn't he have to have more sale of individual items and pay more rent?

A. He does have to pay more rent, but I doubt whether it would be more in proportion to his business.

Q. Doesn't he have to have more clerks?

A. No.

Q. To dole out cigarettes and to dole out tobacco by the packages, he doesn't have to have more clerks? You say you don't think he requires more?

A. No; far less.

Q. That is to say, to sell a hundred thousand cigarettes by retail requires less help than to sell a hundred thousand cigarettes by wholesale?

A. Yes.

Q. Doesn't he require a more expensive store for the volume of his business?

A. Yes; but I don't think that cost would offset the credit risks and salesmen that a sub-jobber has to take.

Q. It is your opinion that the expense is no greater for the same volume of business in dollars and cents?

A. It is my opinion that the sub-jobbers have greater expense.

389 Q. Would you answer me what you think a sub-jobber's overhead would be?

A. I should judge around 2 or 3 per cent.

Q. A sub-jobber's overhead?

A. Yes.

Q. To do business about 2 per cent on his sales?

A. Yes; on his volume of business.

Q. Do you think a retailer can conduct a retail store on an overhead of 2 or 3 per cent?

A. Of course, I don't know anything about that.

Q. From your general knowledge and experience in the business—a separate retail store not connected with the jobbing business on the side?

A. What was that question again?

Q. Do you think that a retail dealer's overhead in tobacco is 2 per cent or 3 per cent?

A. I think it would be not that much. I should not think it would be much more than that, if it would be that much. He has not the same kind of expenses.

Q. What part of the city have you reference to?

A. I only know about conditions in West Philadelphia, where I have been situated for quite a long while.

Q. Suppose a man did a business of a thousand dollars a week, how much do you say his overhead would be? Would he sell one thousand dollars' worth of tobacco in the store for \$20, or \$30?

A. Hardly.

Q. Is one thousand dollars a week sales in the retail store pretty substantial?

A. Yes; that would be quite a sale.

Q. A man who had a store sold \$50,000 worth of goods in a year would have quite some store?

A. Yes, sir.

390 Q. How many clerks do you think it would take to sell over the counter one thousand dollars a week piece by piece?

A. It would depend entirely on the conditions.

Q. In West Philadelphia?

A. Of course, in a place where there is tremendous traffic one clerk couldn't be handling it.

Q. I mean where they don't have standing line as at a box office, but where people buy in the regular course of trade one thousand dollars worth of cigarettes that sell ten cents a package or fifteen cents a package?

A. The only store of that kind that I know of is where a man and his wife and daughter sell it.

Q. They sell one thousand dollars a week?

A. Yes.

Q. That is three of them?

A. Yes.

Q. Their services are worth something. If the girl was not working in the store, she could possibly go out and be a stenographer?

A. Yes.

Q. How much rent does he pay?

A. A hundred dollars a week.

Q. Where?

A. In West Philadelphia.

Q. Tell me a store that does one thousand dollars worth of business with a rent as low as \$100 a month?

A. I was thinking about Lansdowne Avenue.

Q. Can you get such a low rent as \$100 for a store of that kind?

A. I can't say definitely he pays that rent. I can't say that he doesn't own the property.

Q. Suppose he doesn't own it. Is it a corner?

A. It is a corner. Corner of a little street and a main street.

391 Q. You think it was \$100 a month?

A. I guess it is.

Q. How much do you think his light is?

A. I judge around \$12 or \$15 a month.

Q. What other expense has he? He has a little insurance, has he not?

A. Yes.

Q. What else does he have, a little depreciation on his fixtures?

A. Yes.

Q. And coal?

A. Yes.

Q. How much does that amount to?

A. Off hand I could not say.

Q. Don't you know as a matter of fact a retailer in Philadelphia, even the best of that kind can't do business for less than 10 per cent or 15 per cent?

A. I don't know about that.

Q. In view of this illustration you withdraw your statement that a retail dealer could do business on a 2 per cent overhead?

A. I would say 2 per cent is low for retail business.

Q. That man may pay \$200 rent for all you know?

A. He might.

Q. Do you think one thousand dollars worth of goods could be handled by three people?

A. Yes.

Q. Now, before this association was formed, what did you usually give your retail customers?

A. We didn't give percentage according to discount. Our prices varied according to the location for our customer. If competition was keen we gave better prices.

Q. What would arrange those prices?

A. In extreme cases we had to give as much as 7 per cent, and in some instances we had to give 8 per cent when we were getting 10, and 10 and 1.

392 Q. In what part of the city was that?

A. The majority of the business I call on is suburban.

Q. You don't know what they are getting in Philadelphia?

A. What was that?

Q. You don't know what they are getting in Philadelphia?

A. I call on some in West Philadelphia.

Q. What were they getting?

A. Some I was calling on I gave 8 off.

Q. They were very good customers that got 8 per cent?

A. They were prompt pay, large volume, and quick turnover.

Q. That is the largest you gave at any time?

A. Yes; at any time.

Q. And before and after the association was formed, if a customer was not as desirable and he was a moral risk instead of a financial risk you didn't give him 8 off?

A. No.

Q. The man who bought little stuff and had been slow pay, he didn't get anything like 8?

A. No, indeed.

Q. What did he get?

A. He probably paid the list price.

Q. Isn't it a fact, even when the tobacco association was in business that the retailers—the good men who paid promptly got 8 per cent?

A. Yes.

Q. And with the little fellow you spoke of, where they didn't buy very much and didn't get anything off, the jobber did the same thing and gave them the same rate off, didn't they?

A. No; very often they gave them 8 and 2.

393 Q. The man who had a kind of hand-to-mouth store was given 8 per cent, even the bootblack stand that sold two or three cartons a week was offered at the same price?

A. Yes sir; was offered at the same price, we would pay.

Q. But so far as this little bootblack stand was concerned, they were much more generous with him than you sub-jobbers were?

A. Well, if you consider it that way.

Q. While it may have punished you a little this little bootblack fellow got it a little cheaper as a result of this association?

A. As a result of the competition.

Q. Competition with whom?

A. Sub-jobbers.

Q. It was the little fellow who got better prices than he ever got before?

A. At that time; yes.

Q. Then it is a fact as I asked you in your examination as far as the retailer is concerned, he was better off with the association ignoring the sub-jobbers—he got better prices?

A. Well, it was a means of taking him away from the sub-jobber.

Q. From your statement a little while ago while this association existed, the retail fellow, whether big or little, got great benefit because he got a uniform price of 8 per cent off which the sub-jobber didn't give?

Mr. SMITH. Mr. Taulane made a voluntary statement before he asked the question.

A. Which the sub-jobber was not able to give.

394 Q. (Question repeated.) From your statement a while ago while this association existed, the retail fellow, whether big or little, got great benefit because he got a uniform discount of 8 per cent off which the sub-jobber did not give?

A. I will have to admit that; yes.

Redirect examination by Mr. SMITH:

Q. This advantage that the small retailer got came about through the elimination of the competition of the sub-jobber by the jobbers acting in unison through this association? Is that correct?

A. It is.

GEORGE W. DANDY was called as a witness and having been duly sworn, testified as follows:

Direct examination by Mr. SMITH:

Q. Where do you live?

A. Mount Vernon, New York.

Q. Were you sitting at my right here this morning while I was examining Mr. McAninley, the witness who has just left the stand?

A. Yes, sir.

Q. Are you connected with P. Lorillard Company?

A. Yes, sir.

Q. In what capacity?

A. Manager and salesman.

395 Q. How long has that been your position?

A. Well, since December, 1911.

Q. Are you general manager throughout the country?

A. No; only in a limited territory.

Q. What is your territory?

A. This year, New York State and New York City—that is, commencing with the calendar year, the first of January.

Q. What was your territory in 1921?

A. I traveled in the southeastern Pennsylvania and New York State, and that comprises all, I think.

Q. Will you tell us your duties in 1921—the duties of your position?

A. The duties were to generally look after the salesmen and make every effort to keep our business in proper shape and increase it if possible.

Q. Do you know one Max Newman?

A. Yes, sir.

Q. Who is he?

A. He is a salesman in the employ of the Lorillard Company?

Q. Where is he located?

A. Lives in Philadelphia and works here.

Q. Does P. Lorillard & Company have an office in Philadelphia?

A. No.

Q. Where does Mr. Newman make his headquarters?

A. I think the number is 1204 Race Street.

Q. Is that his home?

A. No; that is his advertising depot where P. Lorillard Company stores advertising matter and some where salesmen work.

396 Q. So that in that sense P. Lorillard Company has a place in Philadelphia for storage and a place for its salesmen to work?

A. A storage house for advertising matter. That is what it is called and that is what it is.

Q. Are tobacco goods stored at that place?

A. Only such tobacco goods as are used as samples and the men buy from the jobbers, for delivery to the retail dealers.

Q. How big a place is that?

A. 1204 Race Street?

Q. Yes.

A. You mean the size of the rooms, the warehouse capacity?

Q. Yes.

A. I suppose it is 12 feet front, probably 45 feet or 50 feet deep.

Q. Do I understand you to say the Lorillard Company just has one room there?

A. I am not sure whether they occupy any place in the cellar or basement. I think only the one floor.

Q. Does P. Lorillard Company own or rent that place?

A. They pay rent for the place.

Q. How many salesmen of the Lorillard Company work from 1204 Race Street?

A. I could not tell you exactly how many. I would say probably there was about 30 all told.

Q. Mr. Newman is one of those, I suppose?

A. Yes, sir.

Q. How long has he been doing that?

A. Well, I think he has been with the Lorillard Company five or six years.

Q. In Philadelphia?

A. Philadelphia and eastern Pennsylvania.

Q. Does he travel out from Philadelphia?

A. I am not sure what he does this year. In 1921 he traveled out of here some.

397 Q. What was Mr. Newman's title with the Lorillard Company?

A. Working man. He had no title.

Q. Salesman—did he sell?

A. Yes, he might be a salesman.

Q. Who was the superior or chief of the salesmen of the Lorillard Company in Philadelphia in 1921?

A. There were several departments. Mr. Newman was the head salesman of the men in the smoking department.

Q. What duties did he have as head salesman?

A. His duties were to manage and arrange the work of probably ten or twelve men who worked under him.

Q. Was it his duty also to call on the trade?

A. Yes, sir.

Q. Do I understand you were the superior of Mr. Newman in 1921?

A. Yes, sir.

Q. In 1920, Mr. Dandy, what was your territory?

A. The same as in 1921—no, not quite the same. I came here but I also had a territory comprising a lot of Western States.

Q. But your territory did include Philadelphia?

A. Yes, sir.

Q. Did Mr. Newman have the same position in 1920 as in 1921?

A. No; he succeeded Mr. Fitzgerald when Mr. Fitzgerald died.

Q. When did Mr. Fitzgerald die?

A. The latter part of 1920.

Q. Had Mr. Fitzgerald been ill long before he died?

A. No; he died very suddenly.

398 Cross-examination by Mr. CALDWELL:

Q. Can you give us the exact date of Mr. Fitzgerald's death?

A. I think it was December 21st, 1920.

Q. You attended his funeral, did you?

A. Yes, sir.

Q. Did you or Mr. Newman have any power or authority for the company to make any agreement or arrangement with any of the jobbers or subjobbers here in Philadelphia?

Mr. SMITH. I object to this as not cross-examination.

The EXAMINER. It is the practice to confine yourself to those things gone into on direct examination.

Mr. SMITH. I waive the objection.

A. We did not; no, sir.

Q. Or any authority to announce any policy, either yourself or Mr. Newman, on behalf of the Lorillard Company?

A. No, sir.

Q. Did you at any time or did Mr. Newman in your presence at any time state to Mr. McAninley anything about establishing themselves or himself at Ardmore?

Mr. SMITH. Mr. Examiner, I object and I press objection to this question. This witness was called only to testify to his duties with the Lorillard Company. He was asked absolutely nothing on

399 his direct examination regarding any interview with anybody and they have no right on cross-examination to go into this conversation or any conversation with Mr. McAninley, whose name was not mentioned on direct examination, except that I asked him if he did not sit at my right.

The EXAMINER. It is the practice that you can only cross-examine as to those things examined in chief.

Mr. CALDWELL. I bow to your decision and ask for an exception. (Exception granted.)

JOHN MURPHY was thereupon called as a witness, and having been duly sworn, testified as follows:

Direct examination by Mr. SMITH:

Q. Mr. Murphy, where do you live?

A. No. 1 North Bartram Avenue, Atlantic City, New Jersey.

Q. What is your business?

A. Wholesale tobacconist and retail.

Q. Where is your place of business?

A. 2nd and Market Streets, Camden, New Jersey.

Q. How long have you been in the business in Camden—in that business?

A. About 20 years.

400 Q. What is the name of your firm, Mr. Murphy?

A. Murphy Brothers.

Q. Is that a partnership?

A. Yes, sir.

Q. Are you one of the partners?

A. Yes, sir.

Q. Who is the other partner?

A. James Murphy.

Q. Your brother?

A. Yes, sir.

Q. What tobaccos do you handle?

A. General line—general line of smoking articles.

Q. Do you buy direct from the large manufacturing companies?

A. Yes, sir.

Q. Who are the large manufacturing companies you buy direct from?

A. American Tobacco Company, P. Lorillard Company, Reynolds, Liggett & Myers, Duke & Son, Lares Brothers, quite a number of independent concerns I can't recall.

Q. Have you been buying from all those firms you have named for a long time?

A. Yes, sir.

Q. Where do you sell?

A. Our principal territory is the State of New Jersey and Pennsylvania—that is Philadelphia County.

Q. Do you send trucks over and deliver in Philadelphia?

A. Yes, sir; Philadelphia County.

Q. Do you have salesmen who travel Philadelphia?

A. Yes, sir.

Q. Those salesmen secure orders?

A. Yes, sir.

Q. And transmit them or bring them to your office in Camden?

A. They bring them to our office.

Q. And there they are accepted or rejected, and if accepted filled?

A. Yes, sir.

401 Q. Do you deliver to Philadelphia?

A. Yes; or send some of it over.

Q. Do you also have a retail branch of your business?

A. Two stores; yes, sir.

Q. Where?

A. One Delaware Avenue and Market Street and the other 2nd and Market.

Q. Both in Camden?

A. Camden, New Jersey.

Q. How many jobbers are there in Camden who buy direct from the American Tobacco Company?

A. I think there are three, including ourselves.

Q. How many are there who buy direct from P. Lorillard Company?

(Objected to by Mr. Caldwell unless he knows of his own knowledge.)

A. I know, counsel—three.

Q. How many are there who buy direct from Liggett & Myers?

A. I presume all of them buy on the whole direct list.

Q. Three do, including yourself?

A. Yes, sir.

Q. Of the three which is the largest jobber?

A. I guess Murphy Brothers.

Q. Do your two competitors sell also in Philadelphia?

A. I can't recall that, counsel.

Q. Do any of the Philadelphia jobbers sell in Camden?

A. Yes, sir.

Q. How many of them do?

A. Almost all of them.

Q. And do you meet the Philadelphia jobbers in other places in New Jersey besides Camden?

A. Oh, yes.

402 Q. Do you meet them down as far as Atlantic City?

A. Yes, sir.

Q. Which of the Philadelphia jobbers do you meet down around Atlantic City and other places in New Jersey?

A. The competition down there, I would say, would be with the New Jersey Tobacco Company.

Q. I am speaking of the Philadelphia jobbers?

A. Well, I don't know about that. There are so many small jobbers in south Jersey—that is, in Vineland, Bridgeton—that cover pretty nearly all of that territory. I would say Krull, who sells down there, I believe.

Q. Anybody else sells down that far?

A. I believe Peter F. Murphy—I believe A. B. Cunningham.

Q. Are there other places in New Jersey besides Camden and Atlantic City where you meet competition from the Philadelphia jobbers?

A. No.

Q. Generally in south Jersey?

A. All in south Jersey.

Q. Is there any tobacco jobbers' association in Camden?

A. Not to my knowledge.

Q. Were you a member of the jobbers' association in Philadelphia?

A. Yes, sir.

Q. Do you know when you joined?

A. I believe it was around 1920, in August sometime.

Q. Did you attend the first meeting?

A. Yes, sir.

Q. Was your brother James there, also?

A. Yes, sir.

403 Q. About how many jobbers were present at the first meeting?

A. I judge about 30.

Q. How many meetings did you attend, Mr. Murphy?

A. I think about two, all told. That is, the first, and then there might have been one after that.

Q. Do you remember the adoption of the resolution by the association fixing the maximum discount at 8 per cent?

A. Yes, sir.

Q. Do you remember there was such a resolution adopted?

A. No, sir; I could not say.

Q. Do you remember the adoption of the resolution changing the rate of discount from 8 per cent to 7 per cent?

A. At the first meeting of the organization there wasn't anything secret. There wasn't anything behind doors. Every jobber who joined the association was there in good faith to try to make things better.

Q. Was there any difference between that meeting and subsequent meetings?

A. I never attended any subsequent meetings.

Q. Did you get any word from any of the jobbers of the change of the 8 per cent discount?

A. No, sir.

Q. Did you ever know that?

A. It was on gossip around town.

Q. Where did you get your information from?

A. I would meet a fellow and in a joking way I would say, "Well, are you making a lot of money in the tobacco business?" That's the only way I would learn conditions, because we were always confined to our business in Camden.

404 Q. Did you have some large customers in Philadelphia?

A. Yes, sir.

Q. Is the Philadelphia Wholesale Drug Company one of your customers?

A. Yes, sir.

Q. Is the Post Cigar Company?

A. Yes, sir.

Q. Is Jacob Glazer?

A. Yes, sir.

Q. Was there a customer you had by the name of Honowitz in Philadelphia?

A. Yes, sir.

Q. What, if anything, did you learn was the policy of the association regarding discounts allowed by its members?

A. That's Greek to me, because I never took any interest in it, counsel; I never took any interest in it at all. Only what I learned from my brother.

Q. Your brother was also a member of the association?

A. Yes, sir.

Q. What did he tell you?

A. He said this association of which we both became a member—I guess he attended about half a dozen meetings or so.

Q. What did he tell you about those meetings?

A. Said they organized to better conditions.

Q. Did he tell you what the organization proposed doing concerning discounts?

A. I can't recall.

Q. Before the association was organized what discount were you allowing in Philadelphia?

A. There were all kinds of prices; some got 8 and some got 9.

Q. Some got 10?

A. Yes, 10; and some got 10 and 1.

Q. After the association was organized, what discounts did
405 you allow to your Philadelphia customers?

A. Well, we found conditions in the market that we always tried to make a profit—whatever we found out—if a person was getting 8 or 7 we tried to meet conditions.

Q. Did you sell for a better discount than 8 per cent in Philadelphia?

A. Oh, yes, sir.

Q. After the association was organized?

A. Yes, sir.

Q. Did you sell at better than 8 between October, 1920, and the first of January, 1921?

A. Better after?

Q. After October, 1920?

A. Yes, sir.

Q. You didn't put a maximum of 8 per cent discount on your sales in Philadelphia?

A. No.

Q. Or Camden for that matter?

A. No, sir.

Q. Some time in that period we understand you sold at 9 and 10?

A. Yes, sir.

Q. Do you remember Mr. Krull, of the association, and Mr. Eberbach visiting your place of business in Camden?

A. No, sir; I don't remember that. They dropped in in a casual way and saw my brother.

Q. Were you there at the time?

A. No, sir.

Q. When was that?

A. I can't recall, counsel; that has been a year and a half ago or two years ago, I guess.

Q. Do you remember what you did after that occasion when Mr. Krull and Mr. Eberbach visited your place of business?

A. Yes; I can recall some of it.

Q. Let's have it.

A. My brother jumped all over me about conditions in Philadelphia. He said, "What's the use of giving stuff away"—

406 Mr. Eberback and Mr. Krull dropped in here—he was standing at the window—and they saw him and they were joking and kidding about the association and my brother jumped all over me—he had a way of jumping over me about conditions in Philadelphia—and I got a little peeved about it and there was a dinner given and I went to the dinner.

Q. Who was the dinner given by?

A. I guess it was the usual thing.

Q. An association dinner?

A. Yes, sir.

Q. Where was the dinner?

A. Bourse Building.

Q. Philadelphia?

A. Yes, sir.

Q. Who were there?

A. I can't recall. I think Mr. Krull, Mr. Eberbach, Mr. Cohen—

Q. Mr. William Cohen?

A. No; I don't think he was there—his brother was there.

Q. What is his brother's name?

A. I don't know.

Q. Was Mr. Narrigan there?

A. Yes, sir.

Q. Do you remember whether Kuhn Brothers were there?

A. I could not recall.

Q. Do you remember any other jobbers who were there besides those you mentioned?

A. No; it was a small room and a very cloudy day and I didn't take much notice who was there.

Q. Did you see Mr. Paul Brogan, the secretary of the association, that day?

A. Yes, sir.

Q. Where? Did he appear at the dinner?

A. I guess he was at the dinner.

Q. Did he usher you into the room on that occasion?

407 A. We were walking up and down the hallway when Mr. Brogan was just about coming in.

Q. Mr. Brogan was in the doorway?

A. Yes, sir.

Q. Mr. Brogan was just about coming in?

A. Yes, sir.

Q. Who were walking up and down the hallway?

A. My brother and I—he was just about standing outside or looking out.

Q. You and your brother and Mr. Brogan went into the dinner?

A. We all were there; yes, sir.

Q. Approximately how many were there on that occasion?

A. I judge about 15.

Q. What did Mr. Eberbach say?

A. Mr. Eberbach didn't say a whole lot. It was just about to adjourn. They were putting their coats on to go home.

Q. You had not been in the meeting previous to that?

A. No; we just got there about the time they were about to adjourn.

Q. What did he say to you?

A. He spoke to my brother.

Q. What did he say to your brother?

A. "Jim, have you anything on your mind?"

Q. What did your brother say?

A. He said yes; I believe he says I came over about rumors around about my giving stuff away.

Q. Giving better discounts; is that what he said?

A. I don't know about saying discounts.

Q. Did he say anything about me?

A. About me?

408 Q. In that reply?

A. My brother said, "I brought my brother over here. I had insisted on going with my brother on account of him making me peeved about giving stuff away."

Q. That is, your brother James said that about you to Mr. Eberbach?

A. Yes.

Q. What did you then say to Mr. Eberbach?

A. Mr. Eberbach was just about to go. He was just about to go home. They looked at their watches. It was rather later. It was around 3.30.

Q. Do you remember you asked Mr. Eberbach to give you the names of the people you were giving better discounts than 8 per cent?

A. I can't recall.

Q. Can you tell what happened?

A. I can't recall what I said. I was very peeved at the moment, but I can't recall what I said.

Q. How long after this meeting with Eberbach and yourself and other jobbers did you continue as a member of the association?

A. Why, we quit, I believe, a week or so after that.

Q. Did you tell Mr. Eberbach on this occasion in the Bourse Building that you would quit the association?

A. I don't think I referred to Mr. Eberbach. If I am not mistaken, I told Mr. Brogan.

Q. This was not an argument particularly with Mr. Eberbach but with all the jobbers in general?

A. Yes, sir.

Q. You got angry and they got angry?

A. Yes, sir.

Q. And you withdrew from the association?

A. Yes, sir.

400 Q. Do you have with you your record of your shipments from the Lorillard Company and the American Tobacco Company in 1921?

A. Yes, sir.

Q. May I have them?

A. Yes, sir.

Colloquy between court and council

(Witness produces records.)

Mr. SMITH. Mr. Examiner, we will save time, I think—I have some correspondence taken from the files of the American Tobacco Company; that is, copies of letters and other data taken from the files of the American Tobacco Company; and Mr. Walsh has agreed with me he will not dispute the genuineness or accuracy of these papers. There is one which is a sales department work sheet of the American Tobacco Company, as of September 7th, 1921. As to this sales department work sheet, Mr. Examiner, I don't want to offer in evidence the paper physically, because I want to use this in some other cases, but I will ask that it be copied in the record.

Mr. WALSH. Objected to on the part of the American Tobacco Company as incompetent, immaterial, and not tending to prove any of the issues in this proceeding.

Mr. SMITH. As to the objection as to incompetency I must say I am surprised. I understood Mr. Walsh to say there would be no objection to any of these copies because of their being copies.

410 Mr. WALSH. Not at all. That is true.

Mr. SMITH. You withdraw the objection as to incompetency?

Mr. WALSH. That doesn't go to competency. I do not withdraw it.

The EXAMINER. You are objecting to the material it contains?

Mr. WALSH. There is no objection as to the genuineness of this copy, but it is neither competent nor relevant to this proceeding. I will object to the introduction of anything upon that sheet relative to any other concerns than Murphy Brothers.

Mr. SMITH. Mr. Examiner, as to that objection I want to suggest that all of the things on that sheet clearly tend to prove the reason for the discontinuance of sales to Murphy Brothers, and for that reason the names of the other firms in that sheet who were discontinued from the American Tobacco Company's direct list are relevant and go to show the reasons of the American Tobacco Company in cutting off Murphy Brothers. I think that would appear to you on examination of the paper.

Mr. TAULANE. I object to that on behalf of the other respondents.

Mr. CALDWELL. I would like to put on a general objection to this proposed exhibit and to any other proposed exhibits from 411 the American Tobacco Company as not bearing on the Lorillard Tobacco Company, and ask that they be not received as against the Lorillard Company.

The EXAMINER. I will note your objection. There has been nothing said about the Lorillard Company.

Mr. CALDWELL. Unless your honor rules that they be not received against the Lorillard Company they would be received against the Lorillard Company.

The EXAMINER. I have never looked at them myself. I don't know what they are.

Mr. WALSH. I object to counsel putting on the record the effects of testimony. I think that is a matter for the commission to determine after argument.

The EXAMINER. That statement of counsel is in argument and has no effect. I admit the exhibits and ask the stenographer to note the objection and they will be marked as requested.

Mr. SMITH. Mr. Examiner, I offered in evidence another letter from the sales manager of the American Tobacco Company to Mr. T. F. O'Boyle dated August 27th, 1921, and I ask that this letter be copied into the record as "Commission's Exhibit No. 17."

Mr. WALSH. I object to it as being incompetent, irrelevant, and immaterial and not tending to prove anything within the scope
412 of this inquiry and is not purporting to have been written or is not proven or shown to have been written by anyone on behalf of the American Tobacco Company within the scope of his authority.

Mr. SMITH. Mr. Examiner, again I must say that Mr. Walsh assured me last Saturday in Washington and Tuesday of this week that he would raise no objection as to the genuineness of any of these letters or that there was any question as to their having been written by the people indicated in the letter to the people also indicated in the letters.

Mr. WALSH. I reiterate that now. I reiterate that I agreed then, and I agree now, to just the same thing. There isn't any doubt but what he has copies of the original letters, and I am not saying they are not copies. I am not raising that—there is no doubt as to the authenticity of these letters, as far as we are concerned. We will admit they are authentic copies.

Mr. SMITH. As I understand it, Mr. Walsh waives his objection as to their being copies.

Mr. WALSH. We do not contend that they are not correct copies.

Mr. CALDWELL. I object to them not only on the same ground that Mr. Walsh has objected, but I object to them particularly
413 because they are in no sense binding on the Lorillard Company and should not be received as evidence against that company.

Mr. TAULANE. I object to all of that offered and to be offered on the same ground.

The EXAMINER. Note the objection and note that they have been received.

Mr. SMITH. I understand these objections will apply to all these letters I am about to offer.

COMMISSION'S EXHIBIT No. 17

THE AMERICAN TOBACCO COMPANY,
111 Fifth Avenue, New York City.

MURPHY BROS.,
Camden, N. J.

Mr. O'Boyle, 'phones Mr. Hill.
Mr. Riggio says "Taken off list."

N. V. F.

414

August 27, 1921.

Mr. T. F. O'BOYLE,
Route List.

DEAR SIR: We are advised that Murphy Bros., Camden, New Jersey, are selling the following Philadelphia accounts at list, less 10%:

The Philadelphia Who. Drug Co., 645 North Broad Street, Philadelphia, Penna.

Post Cigar Co., Philadelphia, Penna.

JACOB GLAZER,

3rd & South Streets, Philadelphia, Penna.

Mr. Hill is very anxious to ascertain whether or not this is so, and I would suggest any information you can immediately obtain and send to me will be very highly appreciated.

Very truly yours,

SALES MANAGER.

Murphy off list.

J. B. Bevill.

M. H.

415 Mr. SMITH. I have another letter, Mr. Examiner, dated September 2nd, 1921, by the sales department of the American Tobacco Company to Mr. T. F. O'Boyle, and I ask that it be copied into the record as Exhibit No. 18.

(Same objection by Mr. Caldwell, Mr. Walsh, and Mr. Taulane.

Same ruling.

Letter admitted in evidence and marked "Exhibit 18.")

COMMISSION'S EXHIBIT 18

AMERICAN TOBACCO COMPANY,
111 FIFTH AVENUE,
New York City, September 2, 1921.

Mr. T. F. O'BOYLE,

Route List.

DEAR SIR: I 'phoned your office yesterday and to-day, but you have been out of town.

In connection with the complaint of Murphy Bros. selling at a price to demoralize conditions in and around Philadelphia, one of

the accounts in question is the Philadelphia Wholesale Drug Company. This account is on the direct list of The American Tobacco Co., and I was wondering if in your complaint to Mr. Hill you had this account in mind or only the other two accounts—The Post Cigar Company and Jacob Glazer.

There really wouldn't be much advantage in the Philadelphia Who. Drug Co. purchasing through Murphy.

Either discuss this matter with Mr. Bevill when you see him, or so that the matter is on record there, write us acknowledging this letter and if our understanding is correct. It does seem a little out of order.

Very truly yours,

SALES DEPARTMENT.

N. V. FALLON.

O. K. Mr. J. B. Bevill discussed with Mr. P. S. Hill, Phila. Who. Drug. buying thru Murphy—Cut-price house, but not to be taken off, for they reach trade to our knowledge

N. V. F.

Mr. SMITH. I offer another letter, Mr. Examiner, and ask that it be marked "Commission's Exhibit 19."

(Same objection by Mr. Caldwell, Mr. Walsh, and Mr. Taulane. Same ruling.)

Letter received in evidence and marked "Commission's Exhibit 19."

417 COMMISSION'S EXHIBIT 19

THE AMERICAN TOBACCO COMPANY,
111 Fifth Avenue, New York City.

O. K. N. V. F.
Murphy Bros. discontinued.

T. F. O'BOYLE,
321 Heed Bldg., Phila., Pa.

AUGUST 29, 1921.

MISS N. V. FALLON,
c/o The American Tobacco Company,
New York, N. Y.

MY DEAR MISS FALLON: Replying to Mr. Bevill's favor of August 27th, relative to Murphy Bros., Camden, N. J., I beg to advise that I talked to Mr. Hill on the 'phone to-day and gave him the necessary information.

Yours very truly,

(Signed) T. F. O'BOYLE

T. F. O'Boyle,
LCB.

418 Mr. SMITH. I offer another letter, Mr. Examiner, of the American Tobacco Company, dated September 2nd, 1921, and ask that it be copied on the record and marked "Exhibit 20."

(Same objection by Mr. Taulane, Mr. Caldwell, and Mr. Walsh. Same ruling.

Letter admitted in evidence and marked "Commission's Exhibit No. 20.")

COMMISSION'S EXHIBIT 20

THE AMERICAN TOBACCO COMPANY,
111 FIFTH AVENUE,
New York City, Sept. 2nd, 1921.

File.

Mr. E. J. CRONIN,

Route List.

DEAR SIR: We have been advised by the credit department that the account of Murphy Bros., Camden, N. J., has been discontinued on our list of direct customers for sales reasons.

This is for your information.

Yours very truly,

SALES DEPARTMENT.

E. Greer.

JC.

HVC.

419 Mr. SMITH. I offer another letter dated October 4th, 1921, from the sales department to Mr. E. J. Cronin and ask that it be known as commission's Exhibit No. 21.

(Same objection by Mr. Caldwell, Mr. Walsh, and Mr. Taulane. Same ruling.

Letter received in evidence and marked "Commission's Exhibit No. 21.")

COMMISSION'S EXHIBIT No 21

THE AMERICAN TOBACCO COMPANY,
111 Fifth Avenue, New York City, October 4, 1921.

File.

Mr. E. J. CRONIN,

Route List.

DEAR SIR: We are advised by the credit department that they have reinstated Murphy Bros., Camden, N. J., on our list of direct customers.

This is for your information.

Very truly yours,

SALES DEPARTMENT.

E. Greer.

RR.

SF.

420 Mr. WALSH. The same objection applies to each one of these letters on behalf of the American Tobacco Company.

By Mr. SMITH:

Q. Mr. Murphy, do you have with you the records of your shipments received from the American Tobacco Company in August, September, and October of 1921?

A. Yes, sir.

Q. Mr. Murphy, will you tell us from your records the dates you received goods ordered on particular dates from the American Tobacco Company in August, September, and October, 1921?

Mr. CALDWELL. I object on behalf of the Lorillard Company on the ground it is evidence that should not be received against the Lorillard Company. It is incompetent, irrelevant, and immaterial as to the Lorillard Company.

Mr. WALSH. I object on the ground it is incompetent, irrelevant, and immaterial as to the American Tobacco Company.

Q. Did you not give an order for goods to the American Tobacco Company which you received on August 10th?

A. I could not say. My brother ordered the goods. That is all my brother's business.

Q. Do I understand that your brother James has immediate charge of these things rather than you?

A. Yes, sir.

421 Q. He is more qualified to answer those questions than you are?

A. Yes, sir.

Q. Who is the bookkeeper for the firm?

A. He is.

Q. Your brother is the bookkeeper for the firm?

A. Yes, sir.

(No cross-examination.)

T. A. ALLELY was called as a witness and, having been duly sworn, testified as follows:

Direct examination by Mr. SMITH:

Q. What is your address?

A. 131 Haddon Avenue, Collingswood, New Jersey.

Q. What is your business?

A. I represent Falk Tobacco Company in this territory.

Q. What is your territory?

A. Pennsylvania and part of New Jersey.

Q. How long have you been with the Falk Tobacco Company?

A. 15 years.

Q. How long have you been the representative of that company in New Jersey?

A. The same length of time.

Q. What do you do in pursuance of your duties?

A. Calling on the trade; calling on the retail trade.

Q. Do you call on the jobbing trade along with the retail trade?

A. Yes, sir.

422 Q. Does the Falk Tobacco Company sell directly to retailers or through the jobbers?

A. Through the jobbers.

Q. Do you have salesmen under you?

A. Two.

Q. Do they travel in Philadelphia?

A. Yes, sir.

Q. Did you ever know that Murphy Brothers, of Camden, New Jersey, were taken off the direct list of the American Tobacco Company?

A. Only from remarks passed about town.

Q. In your travels through the trade as you have described?

A. Sir?

Q. You learned that in your travels among the trade, as you have described?

A. Yes.

Q. What reason did you find out in your travels in the trade—

Mr. WALSH. That is objected to. That is hearsay. It is incompetent and in no way binding on the American Tobacco Company.

Mr. SMITH. It is not hearsay. This gentleman says he traveled through the jobbing trade in Philadelphia and he learned in the jobbing trade that Murphy Brothers, of Camden, New Jersey, had been cut off from the direct list of the American Tobacco Company. That goes to show not only that Murphy Brothers were cut off but the jobbing trade in Philadelphia knew it, and if they knew it there was the conspiracy charged in this complaint between the American Tobacco Company and this association.

423 The EXAMINER. If he can state he learned it through members of the Philadelphia Tobacco Dealers' Association I will admit it. Otherwise I can't.

Mr. CALDWELL. It is objected to on behalf of the Lorillard Company.

Mr. TAULANE. I object to it also.

Mr. WALSH. It is altogether too remote.

Mr. SMITH. Do you remember who of the jobbing trade you got this information from?

(Objected to by Mr. Walsh. He has not gotten any information yet.)

The EXAMINER. Ask him about it, Mr. Smith.

Mr. WALSH. I move to strike out the answer.

(Motion overruled. Exception.)

A. Only from remarks passed about town.

The EXAMINER. Unless he can show who he got the information from—somebody in the Philadelphia Tobacco Dealers' Association—I think it will be hearsay.

Q. State whether or not you got that information from somebody in the jobbing business in Philadelphia?

A. I did not.

Q. Where did you get it?

A. As far as I can remember it was general talk among the salesmen.

424 Q. Salesman of whom?

A. Just among the trade, that's all.

Q. Who do you mean by the trade?

A. Retail trade.

Q. Do you sell to the retail trade?

A. I sell to the retail trade, yes.

Q. You do sell to the retail trade?

A. Yes, sir.

Q. Falk Tobacco Company products?

A. Yes, sir.

Q. I thought you said the Falk Tobacco Company only sold to jobbers?

A. We sell to the jobbers and then to the retail trade through the jobbers.

Q. Does the Falk Tobacco Company sell through the jobbers or direct to the retail trade?

A. Direct to the jobber.

Q. And does not sell direct to the retailer?

A. No.

Q. So when you speak of retail salesmen, do you speak of salesmen of the jobbers?

A. Not any particular salesman.

(Objected to. Let him answer.)

Q. What salesman did you mean?

A. It could be any salesman. No salesman in particular. It could be the grocery salesmen.

Q. Well, who did you mean?

A. Really I don't know where I got the information. It was just merely hearsay.

425 Q. Do you appreciate it would not be hearsay if you heard it from the jobber salesmen?

(Objected to. Objection overruled. Exception.)

A. Yes.

Q. Do you appreciate also it would not be hearsay if it was heard from salesmen of the American Tobacco Company?

A. Yes.

Q. Did you hear it from either of those two classes?

A. I did not.

Q. Did you hear it from salesmen of the Lorillard Company?

A. No; I did not.

Q. Did you hear it through salesmen of sub-jobbers of Philadelphia?

A. I did not.

Q. You are sure you heard it from none of that class?

A. Yes.

Q. Did you hear it from salesmen in tobacco stores?

(Objected to by Mr. Walsh as not binding upon anybody if he did hear it.)

A. No.

Q. You said you didn't hear it from salesmen of jobbers in Philadelphia, you have also said you didn't hear it from salesmen of tobacco companies; you said you didn't hear it from salesmen of the Lorillard Company, that you didn't hear it from salesmen of the retail stores—is there any place else you didn't hear it?

A. I really don't know.

Q. You don't know?

A. I don't know where I heard it. If I did, I would say so.

Q. Well, then, do you withdraw those statements that you didn't hear it from salesmen of jobbers or salesmen of the American Tobacco Company; you withdraw all that?

A. Yes, I withdraw all that.

Q. Did you report what you had learned to the Falk Tobacco Company?

A. Just a conditional letter.

Mr. WALSH. Objected to as it doesn't appear he learned anything and the record doesn't show he has learned anything, and what he may have told his employers is of no consequence in this proceeding.

Q. What is a "conditional letter"?

A. General topics, trade topics, general conditions, general gossip.

Q. And you are unable to tell us where you got your information about Murphy Brothers?

A. To be honest.

Q. That is the way we want you to be. You understand that?

A. Yes.

427 JAMES MURPHY was thereupon called as a witness and having been duly sworn, testified as follows:

Direct examination by Mr. SMITH:

Q. Mr. Murphy, where do you live?

A. No. 1 North Bartram Avenue, Atlantic City, New Jersey.

Q. Are you a brother of John Murphy who testified this afternoon in this proceeding?

A. Yes, sir.

Q. Were you in the room when he testified?

A. Yes, sir.

Q. You heard him describe the extent of your firm, Murphy Brothers?

A. Yes, sir.

Q. He was correct in all that, was he?

A. Yes, sir.

Q. Will you give us the date of orders given to the American Tobacco Company and the dates these goods were received by you commencing with July 27th, 1921, and continuing up until some time about the middle of October?

MR. CALDWELL. That is objected to on the ground that the Lorillard Company is not a party, and it is not binding on them, and it is incompetent, irrelevant, and immaterial as to the Lorillard Company.

A. We gave an order July 27th, 1921, and received it 8/10th.
428 We gave an order July 27th, 1921, and received it on August 5th, 1921. We gave an order July 27th and received it August 18th, 1921.

Q. That is you gave an order on July 27th for goods and you received the goods on August 12th?

A. That is correct.

Q. Did you receive an order on July 27th for goods which you received on August 10th?

A. Yes, sir.

Q. Just go right on and tell us when the orders were given and when the goods were received?

A. Ordered July 27th, 1921, received 8th month 11th.
Ordered August 9th. Received 8th month 18th.
Ordered on August 9th. Received 8th month 15th.
Ordered August 9th. Received 8th month 22nd.
Ordered on August 5th. Received 8th month 18th.
Ordered on August 15th. Received 8/19.
Ordered August 9th. Received 8/29.
Ordered August 9th. Received 8/25.
Ordered August 9th. Received 8/20.
Ordered August 3. Drop shipment, shipped August 20th.
Ordered August 16th. Received 8/26.
Ordered August 11th. Received 8/23.
Ordered August 9th. Received 8/27.
Ordered August 25th. Received 8/29.
Ordered August 24th. Received 9/1.
Ordered August 19th. Received 9/1.
Ordered August 24th. Received 9/9.
Ordered August 24th. Received 9/13.
429 Ordered August 24th. Received 9/1.
Ordered August 26th. Received 9/1.
Ordered August 26th. Received 9/13.
Ordered September 30th. Received 10/6.
Ordered September 30th. Received 10/6.
Ordered September 28th. Received 10/5.
Ordered September 21. Received 10/8.
Ordered September 22nd. Received 10/8.

Ordered September 23rd. Received 10/8.
 Ordered September 22nd. Received 10/15.
 Ordered September 21st. Received 10/15.
 Ordered September 30th. Received 10/6.
 Ordered September 23rd. Received 10/6.
 Ordered September 20th. Received 10/6.
 Ordered September 28th. Received 10/12.
 Ordered September 22nd. Received 10/12.
 Ordered September 28th. Received 10/10.
 Ordered September 20th. Received 10/8.
 Ordered September 21st. Received 10/6.
 Ordered September 20th. Received 10/6.
 Ordered October 3rd. Received 10/10.
 Ordered October 11th. Received 10/13.
 Ordered October 4th. Received 10/13.
 Ordered entered October 4, goods shipped. Received Oct. 17.
 Ordered October 6th. Received 10/26.
 Ordered October 10th. Received 10/17.
 Ordered October 12th. Received 10/17.
 Ordered October 12th. Received 10/20.
 Ordered October 10th. Received 10/20.
 Ordered October 10th. Received 10/19.
 Ordered October 13th. Received 10/20.
 430 Ordered October 7th. Received 10/19.
 Ordered October 17th. Received 10/28.
 Ordered October 10th. Received 10/26.
 Ordered October 15th. Received 10/20.
 Ordered October 15th. Received 10/26.
 That's all of them.

Q. Do you have with you a record of the shipments from the Lorillard Company?

A. Yes, sir.

Q. May I have those?

A. Yes, sir. They are right in that batch [indicating].

By Mr. SMITH:

Q. Will you give us, Mr. Murphy, the dates of the orders to the Lorillard Company for August, September, and October and November of 1921, the dates the goods in the order were received?

Mr. CALDWELL. I object to it on the ground that it is incompetent, irrelevant, and immaterial, and in no way tending to prove any of the issues in this action. It does not tend to show any conspiracy, does not tend to show what was the situation as to the credit or as to railroad delays or other delays, if any there were, and that there can be from this testimony no conclusion of any kind drawn to support any of the allegations in the complaint.

(Same objection on the part of the American Tobacco Company.)

431 Same objection on the part of the other respondents by Mr. Taulane.

Objection overruled.

Exceptions allowed.)

A. Ordered 7/27. Received 8/3.

Ordered 7/27. Received 8/5.

Ordered 8/4. Received 8/10th.

Ordered 8/9. Received 8/13.

Ordered 8/9. Received 8/13.

Ordered 8/16. Received 8/24.

Ordered 8/30. Received 9/27.

Ordered 9/21. Received 9/26.

Ordered 9/22. Received 9/26.

Ordered 9/22. Received 9/27.

Ordered 9/21. Received 9/27.

Ordered 9/23. Received 10/10.

Ordered 9/25. Received 10/7.

Ordered 9/20. Received 10/12.

Ordered 9/14. Received 10/12.

Ordered 9/24. Received 10/10.

Ordered 9/24. Received 10/13.

Ordered 10/10. Received 10/14.

Ordered 10/8. Received 10/17.

Ordered 10/15. Received 10/22.

Ordered 10/8. Received 10/17.

Received another shipment October 24th, 1921. Date of order unknown.

Ordered 10/10. Received 10/27.

Ordered 10/19. Received 10/25.

Ordered 10/20. Received 10/25.

Ordered 10/24. Received 10/31.

Ordered 10/13. Received 10/31.

Ordered 10/20. Received 10/27.

432 Ordered 10/24. Received 10/31.

Ordered 10/25. Received 10/31.

Ordered 10/24. Received 10/31.

October 27th. Received 11/9.

Ordered 10/24. Received 11/9.

Ordered 10/29. Received 11/4.

Ordered 10/31. Received 11/7.

Ordered 10/27. Received 11/7.

Ordered 10/31. Received 11/8.

Ordered 10/27. Received 11/9.

November 31st. Received 11/14.

Ordered 10/31. Received 11/16.

Ordered 11/5. Received 11/16.

Ordered October 27th. Received 11/18.

Ordered October 31st. Received 11/21.

Ordered 11/9. Received 11/16.
 Ordered 10/31. Received 11/9.
 Ordered October 24th. Received 11/15.
 Ordered 11/15. Received 11/18.
 Ordered 11/29. Received 12/10.
 Ordered 12/16. Received 12/20.
 Ordered 12/29 on bill marked Received 12/20, being order No. 1084. I can't remember the actual date it was received.
 Ordered 11/22. Received 12/20.
 Ordered 11/22. Received 12/20.
 Ordered 12/27. Received 12/31.

By Mr. CALDWELL:

Q. Are those all of the orders given the Lorillard Company and the shipments received from the Lorillard Company in that period?

A. Yes, sir.

433 Mr. CALDWELL. I now move to strike out the testimony of the witness in answer to the previous question on the ground the testimony shows it is irrelevant, immaterial, and has nothing to do with the issues in this case.

The EXAMINER. Your motion is denied.

(Exception granted.)

Exhibit No. 16, offered in evidence on page 94 reads as follows:)

COMMISSION'S EXHIBIT No. 16

THE AMERICAN TOBACCO COMPANY,
 111 Fifth Avenue, New York, N. Y.

No. 808.

Mr. V. Riggio.

SEPTEMBER 7, 1921.

SALES DEPARTMENT WORK SHEET

Fore 'M' aft.

The 12 oz. and 75¢ paper boxes discontinued.

Master Workmen.

Change in weight from 13 oz. to 15 oz.

434 Accounts added to our list of direct customers

Madison Gro. Co., Madison, W. Va.

Selson, Davis & Son, Austin, Texas (reinstated). (Branches at Taylor & Llano, Texas.)

Jacob Zinman, 193 Ave. C, New York City, N. Y.

Accounts discontinued on our list of direct customers

Bertig Bros., Paragould, Ark. (Retailers.)

S. Z. Joseph Merc. Co., Paragould, Ark. (Retailers.)

Robt. McLane Co., Cameron, Texas (credit reasons); also branch at Caldwell, Texas.

Kelly Bros. Co., Fernandina, Fla. (Inactive.)

Capital City Gro. Co., Tallahassee, Fla. (Credit reasons.)

R. W. Davis & Co., Atlanta, Ga. (Inactive.)

Oglesby Bros., Atlanta, Ga. (No cooperation.)

Murphy Bros., Camden, N. J. (Sales reasons.)

Bernstein & Kursman, Inc., Bridgeport, Conn. (Sales reasons.)

435 Armstrong Gro. Co., Okesehalee, Fla. (closed out); branch at Dayton, Fla.

J. S. Penkussohn Cig. Co., Jacksonville, Fla. (closed out); branch at Savannah, Ga.)

American Grocers Society, Inc., Pittsburgh, Pa. (Sales reasons.)

Nathan Rosenblum, Sharon, Pa. (No cooperation.)

Sher & Sinograd, Milwaukee, Wis. (Sales reasons.)

SALES DEPARTMENT.

Meeting adjourned until to-morrow morning at 9.30 a. m. in this room.

436 BEFORE THE FEDERAL TRADE COMMISSION

FEDERAL TRADE COMMISSION,

VS.

Docket No. 886.

WHOLESALE TOBACCO AND CIGAR DEALERS ASSOCIATION of Philadelphia et al.

PHILADELPHIA, *October 20th, 1922.*

Met pursuant to adjournment, 10.00 o'clock a. m.

Before George McCorkle, examiner.

Appearances: Mr. Smith (Washington, D. C.) for the Federal Trade Commission; Mr. John Walsh and Mr. Junius Parker, for the American Tobacco Company, of respondents; Mr. Charles Caldwell for the Lorillard Company, of respondents; Mr. Joseph H. Taulane for other respondents.

FRIDAY, OCTOBER 20th, 1922—10 a. m.

EXAMINER MCCORKLE. Are you ready, gentlemen?

MR. SMITH. Yes, sir, we are ready to proceed, if your honor please.

437 MR. JAMES MURPHY, having been recalled, and examined by Mr. Smith, testified as follows:

Direct examination by MR. SMITH (continued):

Q. Mr. Murphy, do you buy the products of the Lorillard Company from anybody but the Lorillard Company?

A. No, sir.

Q. Do you buy the products of the American Tobacco Company from anybody but the American Tobacco Company?

A. Just the American Tobacco Company.

Q. You depend on those two companies for your supplies of each of them?

A. Yes, sir.

Q. Of the tobacco products dealt in by your firm, in which do you do the largest business?

A. I would say Lorillard.

Q. Who would you say is next?

A. Duke & Sons; then comes the American Tobacco Company.

Q. If you were unable to secure the products of the Lorillard Company, what effect, if any, would that have upon your business?

(Objected to by Mr. Caldwell on behalf of the Lorillard Company on the ground that it is a hypothetical question. It has not been shown that he was unable to get the products of the Lorillard Company. On the contrary it has been shown that every order he put into the Lorillard Company was filled.)

438 Mr. WALSH. Same objection on the part of the American Tobacco Company.

Mr. SMITH. This question is asked because of one of the allegations in the complaint which makes such questions proper. Paragraph II in speaking of the effect on dealers says wholesale and retail dealers in tobacco products throughout the United States were and still are dependent upon respondent manufacturers for their supply of a large portion of the products in which they deal. The extent of this dependence is such that when any such dealer is unable to secure the products of respondent manufacturers or either of them his business is substantially crippled, and he is placed at a competitive disadvantage with dealers supplied with said products.

Mr. CALDWELL. May I answer that in just a word? I think it is entirely novel in any kind of legal procedure that an allegation in the complaint makes the question proper. That is not basis for the propriety of the question whatever.

The EXAMINER. If this witness was not able to purchase these goods from other people, I think he should state that; he would then be permitted to state what effect it would have if he could not purchase them otherwise, but just to state "if he could not do it"—I think that is entirely speculative.

439 Q. Is there a demand in your business for the products of the Lorillard Company?

A. Is there any demand?

Q. For their merchandise?

Mr. CALDWELL. Objected to because it is perfectly obvious. (Objection overruled.)

A. Yes, sir.

Q. Is there also a demand for the products of the American Tobacco Company?

A. Yes, sir.

Q. What is the extent of that demand for the products of the Lorillard Company?

A. I don't get you, counsel. What do you mean—the amount of money or business?

Q. The extent of the business done in Lorillard Company products?

A. Really, I could not tell you.

Q. Do you also do a big business in the American Tobacco Company's goods?

A. Yes, sir.

Q. Why is it you do such a big business in the products of the Lorillard Company?

A. Because the merchandise sells.

Q. Is it because there is a demand for the goods in your trade?

A. Yes, sir.

Q. Does the same thing apply to the products of the American Tobacco Company?

A. Yes, sir.

Q. Do you know Mr. Eberbach, of the A. B. Cunningham Company, and president of the jobbers' association?

A. Yes, sir.

440 Q. Do you know Mr. Krull—also connected with the jobbers' association?

A. Yes, sir.

Q. Do you know where Mr. Eberbach lives?

A. No, sir.

Q. Do you know where Mr. Krull lives?

A. No, sir.

Q. Do you know the firm Mr. Krull is connected with?

A. I think Krull & Son, isn't it? Charles Krull & Son, I think it is.

Q. Does the A. B. Cunningham Company have an office in Camden?

A. No, sir; not as I know of.

Q. Does the company Mr. Krull is connected with have an office in Camden?

A. Not as far as I know.

Q. Do you know whether Mr. Krull lives in Camden?

A. No, sir.

Q. He does not?

A. Not as far as I know.

Q. Do you know whether Mr. Eberbach lives in Camden?

A. No, sir.

Q. How often have you seen Mr. Eberbach in Camden?

A. About once, to my recollection.

Q. How often have you seen Mr. Krull in Camden?

A. Once to my recollection.

Q. When was that? Did you see the both of them at the same time?

A. Yes, sir.

Q. Where did you see them?

A. They were passing the store while I was looking out the window and they stopped in in a casual way, that's all.

Q. When was this?

A. I really could not answer that question, counsel.

441 Q. Can you tell us approximately when it was?

A. Oh, I guess about 8 to 10 months ago, I guess it was.

Q. They came in your store?

A. No; I was standing at my place of business at the window and they were passing and they stopped in and said "Hello, Jim."

Q. What else did they say to you?

A. Talked over business and accounts, and so forth.

Q. Did they say anything else to you?

A. No, sir; not to my recollection.

Q. You say you talked over accounts and business? Accounts and business, and so forth?

A. Yes, sir.

Q. What was the talk you had over accounts with Mr. Eberbach and Mr. Krull?

A. I can't remember, really, counsel.

Q. They spoke about sub-jobbers, did they?

A. They said about their failing—bad accounts.

Q. You did talk about sub-jobbers, however?

A. Yes; in the regular business routine; what profit was in the business and so many closing up, and so forth.

Q. So many of whom closing up?

A. Sub-jobbers; these stores can't pay their invoices.

Q. Was this conversation with you by Mr. Krull and Eberbach during the time that you were a member of the association?

A. I think it was; yes, sir.

Q. Was there any particular sub-jobber named or discussed in this conversation?

A. No, sir.

Q. Just talked generally about sub-jobbers?

442 A. No; just a little about the business. I don't think they were in there more than five or ten minutes; ten minutes at the most.

Q. Did you ask them what they were doing in Camden that day?

A. No, sir.

Q. Did they suggest to you what they were doing in Camden that day?

A. No, sir.

Q. Did you ask them what business they had in Camden?

A. No, sir.

Q. Did they suggest to you what business they had in Camden?

A. No, sir.

Q. You had never seen the two or either of them in Camden before that?

A. No, sir.

Q. Have you seen them there since?

A. No, sir.

Q. What office did Mr. Krull hold in the association?

A. Vice president.

Q. You were also a vice president, I understand?

A. Yes, sir.

Q. How many meetings of the association did you attend?

A. I don't think over six or eight.

Q. Did you ever withdraw from the association?

A. Yes, sir.

Q. When?

A. I really could not tell you, counsel, when.

Q. Can you tell us approximately when it was you withdrew?

A. I judge about ten months ago, I guess.

Q. Ten months ago would be about December, 1921. Is that when you withdrew?

A. I think it was somewhere around there, counsel.

Q. Do you remember whether you and Mr. Eberbach and Mr. Krull discussed association matters on this occasion when they visited your store?

A. No; they did not.

443 Q. They said nothing about the association?

A. Not to my recollection.

Q. Did they ask you about the discounts you were allowing your customers?

A. I can't recall just that. I would not just like to say.

Q. You would not like to state either they didn't ask you about the discounts, or they did?

A. I can't just remember, counsel.

Q. You don't remember whether discounts were mentioned or not?

A. No; I can't remember that.

Q. Do you remember whether you discussed any of the tobacco manufacturing companies?

A. To Mr. Eberbach?

Q. And Mr. Krull?

A. No; I don't remember anything like that.

Q. Did you discuss any particular sub-jobber?

A. No, sir.

Q. Any particular retailer?

A. Not to my recollection.

Q. Any customers of yours?

A. No, sir.

Q. Did you discuss failure in the tobacco business in Philadelphia or Camden?

A. Well, how that came about there was several of them failed, but who they were I can't just recall just now.

Q. What did you discuss with these two gentlemen on that occasion?

A. I really could not remember because that has been quite a good while ago. I never even let it bother my mind.

Q. Were you ever present at a meeting of the association with your brother?

A. Yes, sir.

Q. How often?

A. I think my brother was there twice with me.

444 Q. What was the first time he was there with you—the organization meeting?

A. No; I don't think he was.

Q. How long after the organization was formed was your brother at a meeting with you?

A. I think the third.

Q. The third meeting?

A. Yes, sir.

Q. How long after that was it that your brother was with you again at the association meeting?

A. I think there was only once.

Q. When was that?

A. I really could not answer that.

Q. How long after the first time?

A. A couple of months, I would say.

Q. A couple of months after he was with you the first time?

A. Yes, sir.

Q. Were you present during the entire meeting on that second occasion?

A. Was I present? Yes, sir.

Q. Was your brother with you during the entire meeting of the association?

A. Yes, sir.

Q. Who presided at that meeting?

A. Why, I really could not answer that, counsel, because I didn't bother my head over it very much.

Q. Was that the meeting when you and your brother withdrew from the association?

A. I think it was; yes, sir.

Q. Who took the minutes of the meeting?

A. That meeting?

Q. Yes.

A. I think it was Mr. Brogan.

Q. When you arrived there was the meeting in progress; had it commenced?

A. It was commenced before I got there.

445 Q. You and your brother then went into the meeting after it had already gone into session?

A. It was practically all over.

Q. You said you were there during the entire meeting and now you say the meeting was practically all over when you got there.

A. With my brother; when I got there with my brother it was all over. As he explained yesterday, we got there late—we were to go to the dinner——

Q. You were to go to the dinner of the association?

A. They had a dinner there.

Q. So that you were not there during the entire session of the association?

A. No, sir.

Q. Where was this meeting?

A. At the Bourse Building.

Q. What is the Bourse Building?

A. Office building.

Q. At whose office in the Bourse Building was this meeting held?

A. Whose office? I really could not answer that. They have a sort of restaurant there.

Q. Was the meeting of the association out in the dining room? Where the dinner was given?

A. I guess it was; I wasn't there until late.

Q. Did you and your brother go to the dinner?

A. No, sir.

Q. Did you go to the Bourse Building that evening for the purpose of attending the meeting of the association?

A. No; we were practically disgusted with the association.

Q. But I understood you say you did not go there for the purpose of attending the meeting of the association?

A. I guess that's pretty near right, counsel.

446 Q. And I understand you didn't go there for the purpose of attending the dinner because you already had your dinner?

A. Yes, sir.

Q. What did you go there for?

A. Just a little spat about prices, and so forth.

Q. Tell us about the spat.

A. There was some talk about our cutting prices which I never bothered my head with.

Q. You bothered your head to the extent of going to this meeting that evening?

A. Yes, sir.

Q. Let us have the story about this spat about prices and discounts which you had on this occasion at the Bourse Building in Philadelphia.

A. The only way I could answer that, counsel, was there was some talk—we were cutting prices was the talk—and we never bothered our heads.

Q. Where did you hear the talk?

A. That we were cutting prices.

Q. Where did you hear the talk that you were cutting prices?

A. It came secondhand to us through our men.

Q. It came to you?

A. Yes, sir.

Q. Who gave the information to you?

A. Our salesmen came in and they must have gotten it off the salesmen of the others.

Q. What did your salesmen report to you?

A. That we were cutting prices—that was the talk. That didn't bother me.

Q. Your salesmen reported it was complained to them you were cutting prices?

A. Yes, sir.

447 Q. Who did your salesmen say you had been cutting prices with?

(Objected to.

Objection overruled.)

A. I can't recall that.

Q. Was that visit of Mr. Krull and Mr. Eberbach to your place in Camden, N. J., before or after the occasion when you and your brother went to the Bourse Building and had, as you testified, the spat with the association?

A. Now, after I have thought over it, Mr. Cunningham said there were several complaints about our cutting prices and that is what started the little fuss.

Q. By "Mr. Cunningham" you mean Mr. Eberbach of the A. B. Cunningham Company?

A. Yes, sir.

Q. Was the visit of Mr. Eberbach and Mr. Krull before or after you had this occurrence in the Bourse Building?

A. While we were in the conversation Mr. Eberbach mentioned that and got me a little upset and I told my brother when he got back off a trip and this banquet they had we were both a little huffed, don't you see?

Q. Do I understand you to say you and Mr. Eberbach and Mr. Krull discussed the same proposition when they visited you in Camden, N. J., and you reported it to your brother when he came back from a trip?

A. Yes, sir.

Q. Was that before or after you and your brother went to
448 this meeting at the Bourse Building at which the dinner was to be held?

A. It was before.

Q. What was the discussion that Mr. Eberbach and Mr. Krull had with you in Camden regarding the cutting of prices?

A. There was nothing particularly that I recall; I really don't know.

Q. How did it come about?

A. I don't really know how it came about. We generally got together; they said, "Well, Jimmie, you have been cutting prices." I didn't bother my head much about it.

Q. You said you can't tell us in particular; will you tell us in general what it was?

A. Only just what I just explained to you.

Q. Mr. Eberbach and Mr. Krull said you had been cutting prices; that is correct?

A. Yes, sir—in any off way kidding me.

Q. What else did they say to you about cutting prices, besides giving you that information?

A. That's all I can recollect, counsel.

Q. Did they say anything about the tobacco manufacturing companies?

A. Not to my recollection.

Q. Did they say anything about the American Tobacco Company?

A. Not to my recollection.

Q. Did they say anything about P. Lorillard & Company?

A. Not to my recollection.

Q. Did they say anything about any of the salesmen of the American Tobacco Company?

A. Not that I can remember.

Q. Or anything about the salesmen of the Lorillard Company?

A. Not that I can remember.

449 Q. With whom did you have the spat at this meeting in the Bourse Building in Philadelphia?

A. I didn't have no spat at all. It was my brother.

Q. With whom did your brother have the spat?

A. I don't know; just a few words passed between Mr. Narrigan; everybody pitched in and had something to say. That's the best I can tell you.

Q. Who were those people you included in the comprehensive word "everybody"?

A. Those who were there.

Q. Who were there?

A. Who were there? Mr. Krull, Mr. Cunningham (Mr. Eberbach), Mr. Narrigan; there was several more, Mr. Counsel, but I really don't remember who they were now. I would say we were there not over 10 minutes.

Q. You said Mr. Cunningham was there. Did you mean Mr. Eberbach?

A. Mr. Eberbach; yes, sir.

Q. What part of the Bourse Building was this spat your brother had with these gentlemen in?

A. I really could not tell you. I could pretty nearly point it out, though.

Q. Was it in the dining room?

A. I would call it a dinner room.

Q. Did you say it was in the "dinner room"?

A. I would say it was in the dinner room.

Q. Did you have dinner with these gentlemen that evening?

A. No, sir.

Q. Mr. Eberbach, Mr. Krull, and Mr. Narrigan ya remember taking part in the "spat"?

A. Yes, sir.

450 Q. And there may have been some others?

A. There was some others.

Q. You don't remember who the others were?

A. No, sir.

Q. Or any of them?

A. No, sir—Mr. Brogan. Mr. Brogan was there.

Q. While this spat was in progress were some of the gentlemen who were there seated?

A. No, they were about finishing up.

Q. The meeting had adjourned or had not adjourned as yet?

A. I could not answer that.

Q. Why do you say they were breaking up?

A. I judge all their affairs they were doing there were practically finished up because Mr. Eberbach pulled out his watch and said, "Jim, is there anything on your mind?"

Q. You were in the room where they all were?

A. Yes, sir.

Q. What did you tell Mr. Eberbach was on your mind?

A. I told Mr. Eberbach I wanted to take up about my cutting prices and then there were a few words.

Q. What were the words?

A. I don't remember.

Q. You don't remember what you told these gentlemen?

A. No, because I didn't speak. It was my brother.

Q. What did your brother say?

A. I don't know. There was only a few words and they all started to put on their hats and coats.

Q. Before this incident of your having cut prices was discussed?

A. Only what Mr. Eberbach said. I could not say about the other people.

451 Q. They were all there when Mr. Eberbach made these remarks to you?

A. Oh, no.

Q. Did I understand you to say the meeting was about finished and not adjourned yet?

A. I don't know whether they had the meeting before the dinner or what, but they were pretty nearly through with the dinner. I guess everything was all through, and Mr. Eberbach got up and pulled out his watch and said, "Jimmie, have you anything on your mind?"

Q. This was in the dining room, then?

A. I don't know what you call it.

Q. Was that where the gentlemen had been eating?

A. It was a room; that is all. That is all I can tell you.

Q. Did you notice any tables there?

A. Yes, sir.

Q. Now, you have said this spat was in the dining room and you told us before it was not in the dining room. Will you tell us which of the two is correct?

A. It was in the room; I don't think it was a dining room; it was a private room.

Q. Do I understand you to say it was a place where the gentlemen had been eating and had just finished eating?

A. Just finished eating. Gentlemen like Mr. Eberbach, Mr. Krull, and Mr. Brogan was there, and it was a regular room there. I don't know what you would call it—dining room or what.

Q. Is that the best answer you can give us?

A. Yes, sir.

452 Q. And the spat lasted five or ten minutes?

A. Yes, sir. It didn't amount to anything and we all went out.

Q. Well, you resigned from the association right there, didn't you?

A. Yes, sir.

Q. Did you tell Mr. Eberbach you were withdrawing from the association?

A. Yes, sir; I told him all—all that was there, that I was through with the association.

Q. Did your brother say the same thing?

A. I could not answer that.

Q. Was Mr. Bevill there that evening?

A. No, sir; not to my recollection.

Q. Was Mr. Newman of the Lorillard Company there?

A. No, sir.

Q. Was Mr. O'Boyle of the American Tobacco Company there?

A. No, sir.

Q. Are you positive of that?

A. Yes, sir.

Q. Can you give us the names of any members of the association besides Mr. Krull, Mr. Eberbach, and Mr. Brogan that were there on that occasion?

A. Mr. Narrigan; I think Mr. Cohen's brother was there. There were quite a few of them. I don't know who of them was there. I don't just remember now.

Q. How is it you remember so positively about the representatives of the tobacco companies and don't remember about the jobbers?

A. I never seen any in those meetings.

Q. You didn't see them at that meeting?

A. I never saw any of them at any of the meetings.

Q. Did you ever see any representatives of the tobacco companies at any of the dinners of the association?

A. No, sir; I did not.

453 Q. Were you on any committees of the association?

A. I was vice president.

Q. Were you on any committees?

A. No, sir.

Q. During the life of the association were you ever in the A. B. Cunningham place of business?

A. Outside of trying to purchase some goods—odds and ends of war stuff.

Q. You have been there?

A. Yes, sir.

Q. And you were there during the life of the association?

A. Yes.

Q. How often?

A. I could not answer that.

Q. Can you tell us approximately how often?

A. I don't believe over once or twice.

Q. Did you see Mr. Eberbach there on both those occasions?

A. Yes, sir.

Q. Who else did you see?

A. I seen his brother and his shipper and, you know, all the work people.

Q. Did you ever see Mr. Krull there?

A. I think I did.

Q. Did you ever see any other tobacco jobber there?

A. Not to my recollection; no, sir.

Q. What was Mr. Krull doing there at the time you saw him?

A. He was going to the meeting.

Q. Going to a meeting?

A. He was going to the meeting; we stopped there and went out and had our dinners together.

Q. Anybody else with you?

A. Not to my recollection; no, sir.

Q. Did you ever see any salesmen of the tobacco companies there?

A. No, sir.

64 Q. At the Cunningham place of business?

A. No, sir.

Q. Did you ever see any of the tobacco manufacturers at any place?

A. No, sir.

Q. Did you ever meet any of them at Mr. Eberbach's going to dinner or at dinner?

A. No, sir.

Q. Your memory is good, I suppose, as to that?

A. Yes, sir; only once or twice.

Q. You and Mr. Krull and Mr. Eberbach are the three of the jobbers that were together on at least two occasions at the Cunningham place?

A. One occasion that we were at dinner when we were going to the association.

Q. Do you know Mr. Ball of the Lorillard Company?

A. Yes, sir.

Q. How long have you known him?

A. I guess since I have been in the wholesale business.

Q. How long do you say that was?

A. I judge about 15 years.

Q. Is Mr. Ball in the selling department of the Lorillard Company?

A. Yes, sir.

Q. He visited your place of business in Camden?

A. Yes, sir.

Q. Does he still visit it?

A. When he covers this section he always stops and sees me.

Q. Is he covering this section now?

A. I don't know. I could not answer that.

Q. Does he continue his visits to your place?

A. I should say he comes there about twice a year.

455 Q. In 1921 how often did he visit you?

A. He visited me! I could not say whether he visited me in 1921 or not.

Q. Did you see Mr. Ball any other place besides your place of business in 1921?

A. At New York.

Q. Where in New York?

A. At his office.

Q. Where is his office?

A. I don't know the address. I don't bother my head about the numbers but I know where it is very well.

Q. How often in 1921 did you see Mr. Ball at the office of the Lorillard Company?

A. I must have seen him at least half a dozen times last year.

Q. Did you see him before you withdrew from the association?

A. I think I did; yes, sir.

Q. Did you ever see him after you withdrew from the organization?

A. Yes, sir.

Q. Do you know whether Mr. Ball knew that your firm was a member of the Philadelphia Tobacco Dealers Association?

A. I could not answer that.

Q. Did you ever inform Mr. Ball that you were connected with the Philadelphia Wholesale Tobacco Dealers Association?

A. Oh, yes.

Q. When did you give him that information?

A. I don't know.

Q. Was that at the time you joined?

A. Later on I did.

Q. You told him that you were?

A. Sure.

Q. Did you ever tell Mr. Ball that your firm had withdrawn from the association?

A. Not to my recollection.

456 Q. Did you tell Mr. Ball the maximum discount agreed upon by the association?

A. I could not really answer. I might have told him that in our conversation of talking. I could not remember anything like that now, counsel.

Q. Do you think you did tell him that?

Mr. CALDWELL. That is objected to as quite contrary to the last answer.

(Objection overruled.

Exception.)

Mr. CALDWELL. May I move to strike out the last answer, as "what might have happened" is not testimony.

The EXAMINER. That is his way of talking, so we will let it go in. (Exception.)

A. I might have told him that, counsel; that is the best I can tell you. I can't remember that.

Mr. CALDWELL. I move to strike that out as incompetent and irrelevant.

The EXAMINER. Motion denied.

Mr. CALDWELL. Can your honor base any report on what he might or might not have done?

The EXAMINER. I am not on the witness stand, brother. Proceed.

Q. Did you tell anybody of the Lorillard Company, besides Mr. Ball, that your firm had joined the association?

A. I can't answer that, counsel.

457 Q. Why not?

A. I don't remember.

Q. Did you state to anybody of the American Tobacco Co. that your firm had joined the association?

A. No; I can't answer that either.

Q. You don't remember that?

A. No, sir.

Q. Do you know Mr. Bevill, of the American Tobacco Company?

A. Yes, sir.

Q. Did you ever tell him your firm was a member of the association?

A. No, sir; not to my recollection.

Q. Did you ever tell Mr. O'Boyle, who was formerly connected with the American Tobacco Company?

A. Not that I can remember.

Q. Has Mr. Bevill been at your place of business?

A. Only once, I think.

Q. When?

A. Three or four years ago, I would say. I really don't know.

Q. Did Mr. O'Boyle visit your place of business?

A. I really could not answer that, because I would not know Mr. O'Boyle if I saw him.

Q. Who are the representatives of the American Tobacco Co. who had visited your place of business?

A. Occasionally Mr. Cronin.

Q. Who else?

A. I don't know of anybody else just at present.

Q. Has Mr. Cronin been the only representative of the American Tobacco Company who has negotiated with you in the last two years?

A. Oh, no.

Q. Who are the others?

A. There were several others.

Q. You don't remember who they are?

A. I don't know. In fact, there was Mr. Cronin and
458 Colonel Somebody—I don't remember who he was—and Mr. Riggio. That is the best I can answer.

Q. Who is Mr. Cronin?

A. He is a salesman in Camden. That is the best I can tell you about him—their advertising man or something. I really don't know.

Q. Did you buy through Mr. Cronin?

A. No; I generally sent my orders direct myself.

Q. Your orders are never solicited?

A. No.

Q. No representative of the American Tobacco Company calls on you for your orders?

A. No.

Q. What was Mr. Cronin's business with you?

A. I guess he did missionary work, placing new goods, and so forth, to the trade we sell and turned the orders over to us or what jobbers he would get the orders on.

Q. How are those orders shipped to the retailer?

A. Shipped from our stock.

Q. Did Mr. Cronin also get orders credited to you which were shipped direct from the American Tobacco Company?

A. I really don't know anything about that.

Q. Did the American Tobacco Company in the last two years make "drop shipments" for your firm?

A. Drop shipments to the trade; yes, sir.

Q. What is the drop shipment?

A. They have a little deal on like three bags of Sweet Caporal—if the party buys a combination.

Q. Are those the shipments made direct by the American Tobacco Company to the retailer or purchaser?

A. Counsel, I will explain that to you to the best of my
459 ability. Those orders are taken, and if a customer belongs to us and doesn't owe us very much money, I will O. K. that, and the American Tobacco Company ships it and charges it to me.

Q. Who solicits that order.

A. The American Tobacco Company.

Q. Itself?

A. They have a bunch of men for it.

Q. Your firm doesn't solicit those orders?

A. Yes, we do; but I don't work our men on that. We have other goods to work.

Q. The American Tobacco Company work on those?

A. Yes.

Q. And they get those orders?

A. Yes, sir.

Q. And the goods are shipped direct by the American Tobacco Company to the customer?

A. Yes, sir.

Q. And you get from the American Tobacco Company an allowance on that?

A. Those goods are billed just the same to us.

Q. You get your discount?

A. Yes, sir; just the same.

Q. You profit on those transactions?

A. No more than any others.

Q. I asked you whether you don't get a profit on those goods?

A. Just the same as other merchandise.

Q. But it is more profit than on the other merchandise?

A. Only outside the delivery.

Q. They make the delivery of the merchandise?

A. Yes, the delivery; that is about all.

Q. You have no expenses in connection with those orders?

A. Yes; I do.

400 Q. How do you have expenses connected with those goods; you have expenses connected with the other goods that you make delivery of yourself?

A. Yes.

Q. And the American Tobacco Company make delivery of these goods direct?

A. Yes.

Q. Then you do make more profit on those orders than on the others?

A. Yes, sir; I understand you now; yes, sir.

Q. So that your profits in your handling of tobacco products of the American Tobacco Company does not arise only from the goods you handle and deliver yourself. Is that correct?

A. Yes, sir; that is correct.

Q. Do the other tobacco companies that manufacture, operate in that respect—the same as the American Tobacco Company—those drop shipments?

A. Yes; off and on they have different "deals."

Q. The Lorillard Company has those deals as well as the American Tobacco Company?

A. They have something in that line but a little different. That is the best I can explain to you.

Q. There are some lines of the Lorillard Company which at times you don't handle yourself, or sell yourself, but on which you make a profit?

A. No; we handle all their orders.

Q. And you deliver it yourself?

A. Yes, sir.

Q. Is there anything in the line of the Lorillard Company's products that they make drop shipments on for you?

A. Not as far as I can remember, counsel. I don't think they do.

461 Q. I thought I understood you to say the other companies operated the same as the American Tobacco Company?

A. Duke & Son and R. J. Reynold, but Lorillard doesn't have any drop shipments which they deliver to our trade.

Q. Liggett & Myers, Reynolds, the American Tobacco Company, and Duke & Sons are the ones of the big tobacco companies who have drop shipments?

A. Yes, sir.

Q. The Lorillard Company does not have drop shipments?

A. They have drop shipments, but we deliver from our stock.

Q. Those orders are secured by whom?

A. By our own salesmen largely.

Q. Mr. Murphy, in the case of the shipments that are made by the American Tobacco Company direct to the purchaser, where the orders are secured by the American Tobacco Company, who does the purchaser pay—the American Tobacco Company or you?

A. They pay us.

Q. The purchaser pays you?

A. Yes, sir; and our men take the orders just the same as the American Tobacco Company men, when we have the time to work them.

Q. I am asking you with respect to the shipments where the orders are taken by the American Tobacco Company's men and shipped direct by the American Tobacco Company. Who does the purchaser pay for those goods—the American Tobacco Company or you?

A. Pays us.

Q. And you settle with the American Tobacco Company?

A. Yes, sir.

462 Q. Are there any shipments made by the American Tobacco Company to your customers where the American Tobacco Co. is paid directly by the person to whom the goods are shipped?

A. No, sir.

Q. You collect for all of the shipments made by the company directly on these orders?

A. What we order for the American Tobacco Company to ship—what we sign. What we order for the American Tobacco Co. to ship and we pay them. The customer pays us.

Q. Do I understand in case of all those shipments made by the American Tobacco Company you sign an order on the American Tobacco Company?

A. When the missionary turns them in to us.

Q. Those you sign?

A. Yes, sir.

Q. Are there any orders secured by the American Tobacco Company's missionaries or other representatives for goods which are shipped direct to the purchaser by the American Tobacco Company where you do not sign the orders?

A. No, sir.

Q. I show you a letter dated March 19, 1921, from J. B. Beville, sales manager of the American Tobacco Company; did you receive that letter?

A. We received a letter similar to that.

Q. Did you receive that letter?

A. I judge we have—I guess we must have, counsel.

Q. There isn't any doubt about it, is there?

A. It is marked for me there [indicating on the letter].

Q. Didn't you hand me this letter the other day, saying you received it from the American Tobacco Company?

A. I handed it to you? No; you took it out of the package.

Q. It was in the package that came from your office, that you gave to me?

A. Yes, sir.

Q. This letter came from your office?

A. Yes, sir.

Mr. SMITH. This letter, Mr. Examiner, I offer in evidence and ask that it be marked "Commission's Exhibit No. 22."

Mr. CALDWELL. I object to the introduction of this letter as in any wise binding on the Lorillard Company.

Mr. WALSH. I object to it as irrelevant, immaterial, and incompetent and not showing that the writer made any statements within the scope of his authority.

Mr. CALDWELL. I also object to it on the same ground on behalf of the Lorillard Company.

The EXAMINER. The letter is received and will be marked as requested by the attorney for the commission.

(Exceptions allowed.)

Q. Mr. Murphy, did you reply to that letter?

A. Did I reply?

Q. Did you reply to this letter marked "Commission's Exhibit No. 22" of this date?

A. Yes; I guess I must have.

Q. I show you a carbon copy of the letter dated March 30th, 1921, addressed to J. B. Beville, of the American Tobacco Co., and ask you whether that is a carbon copy of the letter in the reply which you made to the letter known as commission's Exhibit No. 22?

A. I guess it is.

Q. Isn't it a copy of the letter you sent to Mr. Bevill?

A. I can't just recall it. This was last year. It is marked "from Murphy Brothers" and I guess I must have sent it.

Q. Isn't this carbon copy a paper that was fastened to commission's Exhibit No. 22 and handed by you to me during the course of these meetings from your files?

A. All those papers we brought up we had them packed up and you took it out from that.

Q. I will repeat my question: Isn't this carbon copy a paper that was fastened to commission's Exhibit No. 22 and handed by you to me during the course of these proceedings, from your files?

A. I can't answer a question like that. I brought my papers up here and you went through them.

Q. This is one of the papers from your files?

A. I guess it is.

Q. You have no doubt about it?

A. No; I guess it is.

MR. CALDWELL. I make the same objection as above on behalf of the Lorillard Company.

MR. WALSH. Same objection on behalf of the American Tobacco Company.

EXAMINER. Same ruling.

(Objection overruled.

Exceptions.)

465 The EXAMINER. The paper is admitted and will be marked "Commission's Exhibit No. 23," as requested.

By MR. SMITH:

Q. Mr. Murphy, the maximum discount allowed by the association members in March, 1921, was 8%, was it not?

A. I really could not say: I could not tell you because I didn't bother my head what they were selling merchandise for. I sold merchandise to suit myself.

Q. Don't you know the association had agreed upon a maximum discount of 8%?

A. Yes; but I could not tell what date that was.

Q. Do you know they had agreed upon a maximum discount of 7%?

A. Yes, sir.

Q. You know the change was made in June, 1921—that change from 8% to 7% discount.

A. I could not recollect the date.

Q. But it was sometime in June, 1921?

A. Yes.

Q. Do you know Mr. Maloney of the Lorillard Company?

A. Yes, sir.

Q. Who is he?

A. President.

Q. Do you know Mr. Belt of the Lorillard Company?

A. Yes, sir.

Q. Who is he?

A. Vice president.

Q. Did you ever tell Mr. Maloney that you were a member of the Lorillard Tobacco Dealer's Association?

A. Perhaps I did in our conversation. I really could not say.

Q. Did you ever tell Mr. Belt that?

A. I could not say that either.

466 Q. Did you ever tell Mr. Maloney that there was an association in Philadelphia?

A. I can't just remember, counsel.

Q. Did you ever tell Mr. Belt?

A. I can't remember that either.

Q. Do you remember whether Mr. Maloney ever asked you about the association in Philadelphia?

A. I can't answer that either.

Q. You don't remember that?

A. No, sir.

Q. Do you remember whether Mr. Belt ever discussed the Philadelphia association with you?

A. No, sir; I can't remember that either.

Q. What do you say about Mr. Ball? Did you ever discuss the association with Mr. Ball?

A. Yes; on one occasion, I did.

Q. That was when the maximum discount fixed by the association was 7%, wasn't it?

A. I don't know whether it was 7 or 8 when I was speaking to Mr. Ball in reference to it.

Q. Do you remember what you said to Mr. Ball about the association?

A. No; I don't.

Q. Do you remember what Mr. Ball said to you?

A. He made one remark there about I ought to be making money now.

Q. Because you were a member of the association?

A. No; because the way we were selling.

Q. At 7% and 8%?

A. I used to sell at 10 and 1 off.

Q. Do you remember anything else Mr. Ball said?

A. Not concerning the association.

Q. Don't you remember Mr. Ball told you he would like to see you sell at 7%?

467 A. No; Mr. Ball said he would like to see me make better profits than I have been making.

Q. Didn't he say he would like to see you stick to the discounts fixed by the association?

A. I can't say that.

Q. You don't say he didn't say that?

A. I don't remember it, counsel.

Q. Don't you remember you said so to Mr. Cowie? That Mr. Ball told you that?

A. No; Mr. Cowie must have misunderstood me.

Q. I am asking you whether you didn't tell Mr. Cowie that?

A. I can't remember that. It is quite a little while ago.

Q. Don't you remember telling Mr. Hass, who sits at my left, and who is my associate in this case, that? Don't you remember telling him sometime this week that Mr. Ball told you he would like to see you uphold the discounts fixed by the association?

A. No.

Q. Don't you remember telling me in this room on Tuesday of this week that Mr. Ball told you that he would like to see you uphold the prices fixed by the association?

MR. CALDWELL. I object to that as being incompetent, irrelevant, and immaterial and as not proper direct examination and not binding upon the Lorillard Company, and that it is in every way incompetent in this proceeding.

THE EXAMINER. The objection is overruled. Answer this question, Mr. Witness.

(Exception.)

468 A. Counsel, I must have misunderstood you or you misunderstood me. I never had any conversation with Mr. Ball telling me to go along with the association.

Q. I ask you again. Didn't you tell me on Tuesday of this week that Mr. Ball had told you he wanted to see you uphold the prices fixed by the association?

(Objected to by Mr. Caldwell.

Objection overruled.

Exception.)

A. Counsel, I don't remember.

Q. You don't remember whether or not you told me that?

A. No.

Cross-examination by Mr. CALDWELL:

Q. Mr. Murphy, did you ever at any time have any conversation with Mr. Ball in words or substance, in which he asked you to uphold or maintain the prices of the Philadelphia Tobacco Wholesalers Association?

A. No, sir; not to my memory.

Q. Did you ever grant a larger discount, during the lifetime of the association, than the 7% and 8% discounts hereinbefore referred to?

A. I don't get that.

Q. Did you not, during the period of the life of the association, from time to time, grant a larger discount than 8% and 7% herein referred to from time to time?

A. Yes, sir.

469 Q. Were you ever at any time during the life of the association cut off from purchasing from the Lorillard Tobacco Company?

A. No, sir, not to my recollection.

Q. Were not all orders you gave to the Lorillard Tobacco Company filled, and received by you in due course?

A. Yes, sir.

Q. Have you any recollection of ever having told Mr. Ball anything about the maximum discount adopted by the Philadelphia association?

A. I can't just remember that.

Q. Have you any definite recollection that you ever told Mr. Maloney, the president, or Mr. Belt, the vice president of the Lorillard Company, that there was an association in Philadelphia known as the Philadelphia Wholesale Tobacco Jobbers Association?

A. I don't know. Perhaps I might have told them.

Q. Have you any recollection of it?

A. No, sir.

Q. You state that Mr. Ball in substance told you that he would like to see you making money in your business?

A. Yes, sir.

Q. And that was about the size and substance of your conversation?

A. Yes, sir.

Q. At the time that you were giving a larger discount than 8% were you making any money on the Lorillard products?

A. Very little.

Q. When you were giving 10 or 10 and 1 per cent discount were you making money or were you losing money?

A. I guess we were losing money.

470 Q. Don't you know as a fact, taking into consideration your overhead, you were losing money at those prices?

A. If we didn't have some of the small business to offset that we were.

Q. In that particular business?

A. Yes, we lost money on that.

Q. Was not your account from time to time occasionally in rather bad shape with the Lorillard Company so that they were interested in your making money to enable you to pay your account?

A. Yes, sir.

Q. Why did you sell at 10 or 10 and 1 off discount, if you were losing money?

A. Why, we didn't have so very many of those accounts and we were forced to sell it that way and we met conditions.

Q. Why forced?

A. Sir?

Q. Why were you forced to do it?

A. By other jobbers slicing the prices.

Q. And it was to meet the conditions?

A. Yes, sir.

Q. Were other jobbers, members of the association, selling at these same discounts, to your knowledge?

A. From what I understand.

Q. They were?

A. From what I understand; yes, sir.

Q. So that this resolution of the association was more or less of a dead letter?

A. What was that?

Q. The resolution with reference to 7% and 8%?

A. It was a "joke."

Q. It was more honored in the breach than in the observance?

A. Yes, sir.

471 Cross-examination by Mr. WALSH:

Q. Mr. Murphy, did anyone connected with the American Tobacco Company ever remonstrate with you or object to any prices you were charging for the goods you bought from them?

A. No, sir.

Q. No one connected with the American Tobacco Company ever said anything to you about it?

A. No, sir.

Q. And you never discussed it? You never discussed it with anyone connected with the American Tobacco Company?

A. No, sir.

Q. Was there any time while you were a member of the association that you did not get all the goods you ordered from the American Tobacco Company?

A. I got all the goods I ordered.

Q. Did you get them in due course?

A. I judge so; yes.

Q. So far as you know, then, Mr. Murphy, you never were dropped as a customer from the direct list of the American Tobacco Company?

A. Not as far as I know.

Q. That is, I mean Murphy Brothers?

A. Murphy Brothers; no, sir.

Q. You testified here to some sort of a spat at a meeting of the jobbers. Did anybody at that meeting of the jobbers' association tell you that your attitude or the method by which you were doing business or the prices at which you sold your goods would be brought to the attention of the American Tobacco Company or any other tobacco company?

A. No, sir.

472 Q. Or did anybody intimate to you at any time—I mean any member of the association—intimate to you directly or indirectly that the American Tobacco Company or the Lorillard Tobacco

Company's attention would be called to the prices at which you sold?

A. No, sir.

Q. Did anybody ever ask you to resign from the association?

A. No, sir.

Q. Did anybody ever threaten you that you would be dropped from the membership of the association?

A. No, sir; not as far as I can recall.

Q. Does your firm, Mr. Murphy, have an account with the American Tobacco Company?

A. Yes, sir.

Q. And I will ask you whether or not the American Tobacco Company have not constantly been solicitous of this account or the account your firm owed the American Tobacco Company?

A. Yes, sir.

Cross-examination by Mr. TAULANE:

Q. Mr. Murphy, as a result of the resolution making a maximum discount of 8%, was that an advantage to the retail dealers?

A. Oh, yes.

Q. How?

A. They were getting 1% more.

Q. How do you mean they were getting 1% more?

A. Is that the association you have reference to?

Q. No; the retail dealers.

A. Let me understand you.

473 Q. I ask you whether the retailers bought their goods cheaper?

A. The biggest percentage of them bought cheaper.

Q. Bought cheaper?

A. Yes, sir.

Q. That was a benefit and an advantage to the retailer?

A. Yes, sir.

Q. Didn't you withdraw from this association in April?

A. I really could not tell you what time, but I withdrew.

Q. There were a number of people you sold at a greater discount than 8 per cent?

A. Yes, sir; positively.

Q. Small people?

A. Yes, sir.

Q. This resolution fixed the discount at 8 per cent.

A. Yes, sir.

Q. Did you understand that you were to sell to all people at 8 per cent discount?

A. I sold the goods to suit myself.

Q. You understood the purport of that resolution to mean you could sell to suit yourself?

A. I sold more than 8 per cent.

Q. What's that?

A. I sold my merchandise at the best prices I could get.

Q. Even during the life of the association you did not observe it at all?

A. No, sir.

Q. In competition, did you meet other jobbers, members of the association, who were also selling at a better discount than 8 per cent?

A. Yes, sir.

Q. And that is the reason you did it?

A. Yes, sir.

Q. As far as your knowledge of the trade during all the lifetime of the association is concerned, did the members follow the
474 recommendation of the association as to the 8 per cent discount?

A. What was that?

Q. As far as you know, from your knowledge of the business, did the jobbers, members of the association, follow the recommendation of the maximum discount of 8 per cent?

A. They gave all sorts of prices.

Q. You got that from your experience in the business, from the competition you met?

A. Yes, sir.

Q. That was while the association was in existence?

A. Yes, sir.

Q. Some of your very small customers, with very limited credit, did you sell at list prices, or not?

A. Very small people—the very best prices we could get.

Q. What were some of those prices?

A. Seven per cent, eight per cent, nine per cent.

Q. Didn't you ever sell any goods at less than 8 per cent?

A. Oh, yes.

Q. The man who had a little boothblack stand or the corner grocer?

A. We sold at all prices; 2 per cent off, 5 per cent off.

Q. You did sell him at 5 per cent off?

A. Yes; and sometimes more. If he was a hard proposition we had to give more.

Q. That is what you did?

A. Yes, sir.

Q. And to your knowledge that is what they all did?

A. Yes, sir.

Q. Do you know when this organization ceased to function?

A. No, sir.

Q. But the conditions you have described prevailed while
475 you were a member of the association and after you ceased to be a member of the association?

A. Yes, sir.

Q. Will you tell me what factors entered into what discount a customer got?

A. I don't get you.

Q. Did a man's credit, his financial standing or time of payment have anything to do with the amount of discount you would allow?

A. Yes.

Q. How?

A. If he was slow he would only get 8% or 9%, according to the way we could work him.

Q. If he were a very small dealer?

A. Just as I explained before, if he wasn't very bright he would have to pay us list price.

Q. But only the very good customers got the better discounts?

A. Only those that understand the tobacco business got the best prices.

Q. And those who understood it very well got better discounts than this resolution of the association, fixing the discount?

A. Yes, sir.

Redirect examination by Mr. SMITH:

Q. Give us the name, please, of one customer of yours that you sold at list price?

A. Well, counsel, I can't just remember the names.

Q. How many were there?

A. I would say we had a few of them we got list price from.

Q. How many do you mean by "a few"?

A. Three or four or maybe two.

Q. Maybe two?

A. Yes, sir.

Q. Who are those two?

A. One in Greenwich.

66 Q. What's his name?

A. I don't remember.

Q. Where is the other one?

A. I don't remember. I can't tell you just now.

Q. You can't give us the names of say two to whom you sell at list price?

A. No; there are lots of small places.

Q. Will you answer the question?

A. What was the question?

Q. (Question repeated.) You can't give us the name of the two to whom you sold at list price?

A. Not just now. I can't bring it to my mind, but they are very small.

Q. How many customers do you have all told?

A. I can't tell you.

Q. Three thousand?

A. No.

Q. Two thousand?

A. I can't say.

Q. Is it 1,000?

A. I guess it would be 1,000.

Q. Out of the 1,000 there are only two at the most to whom you sell at list price? Is that correct?

A. Well, at the counter, when they come into the store, but I really don't know who they are.

Q. Then these people you sold to at list were people you sold over your counter?

A. Some people, not all—some of the extra small ones.

Q. Do we understand you want to correct your statement which was that there were only two you sold at list?

A. No; I could not say that.

Q. Then you don't know whether it is more than two?

A. Yes, sir.

Q. I understand you to say these people came into your store and bought there?

477 A. I judge some of them did; small buyers that buy only two or three dollars worth.

Q. You sold them at list price?

A. Yes, sir.

Q. Are they dealers?

A. Well, I always see them occasionally coming in.

Q. Do you conduct a retail business also?

A. Yes, sir.

Q. That is at your retail store is where you got list?

A. Yes, sir.

Q. When you sold during the period of the association, when it was agreed that the maximum discount of 8%, did not the face of the invoice from you to your customer contain the maximum discount?

A. Yes, sir.

Q. And when the maximum discount was 7%, that is the agreed maximum discount of the association was 7%, is it not a fact that your invoices to customers showed 7%?

A. Yes, sir.

Q. But you were allowing some of them 10 and more than 10%?

A. Yes, sir.

Q. Why, when you were allowing some of your customers a better discount than the maximum discount agreed upon by the association, did you put on the face of the invoice the maximum discount instead of the correct and true discount you were allowing the purchaser?

A. Well, while the association was going on we put whatever was the association price; if it was 7% we put 7 and if it was 8% we put 8 and allowed them a rebate.

Q. I asked you why you put on your invoices the maximum
478 discount allowed by the association in those cases? Why didn't you put on the true discount?

A. Well, I don't know.

Q. Was it because you were afraid of the association?

A. No; I wasn't afraid of the association.

Q. Why didn't you put on the correct discount?

A. That was supposed to be all the way around amongst all the jobbers—those prices and that is why I carried suit.

Q. I understand so, but that yet doesn't answer the question. Why, when you were selling at better than the maximum discount didn't you put the real and true discount on the face of the bill instead of the ones you did put on? Why didn't you put on the real discount?

A. Just as I explained to you. The whole situation was 7%.

Q. I will help you—did you know the association had hired an investigator?

A. I heard somebody say, but I didn't bother my head about that.

Q. You knew the association had an investigator?

A. No.

Q. You heard about it?

A. I just heard it.

Q. You attended the first several meetings?

A. Yes, sir.

Q. And you were at the organization meeting?

A. Yes, sir.

Q. Wasn't it at the organization meeting the association passed a resolution to appoint an investigator?

A. I didn't bother my head.

Q. You were there?

A. Yes, sir.

479 Q. And you didn't bother your head to find out?

A. I was talking to the men there and I didn't bother my head about the association.

Q. Did the fact that the association had hired an investigator have anything to do with your putting on a maximum discount instead of what you did allow?

A. No, sir.

Q. That had nothing to do with the fact that you put on the invoices the maximum discount allowed by the association, instead of putting on the true discount?

A. No, sir.

Q. What did you say was your reason?

A. Everybody was supposed to sell for 7% or 8%, and we just went along that way, see?

Q. But you didn't go along that way. You said you sold at 10% and in some cases 10 and 1. What I am trying to find out was why, when you sold at 10%, you put on your invoices 8% or 7%, as the case might be that prevailed at the time, when you were really allowing the customer 10%. Tell us why?

A. Let them believe they were getting more.

Q. Let whom believe?

A. The storekeeper.

Q. And you tried to persuade the other jobbers by those invoices that you were allowing 8% or 7%, as the case might be?

A. I could not persuade them. They had to persuade themselves.

Q. So that your answer is that you thought it would make the retailer, customer of yours, feel good if when you were allowing him 10%, you put on the face of the invoice you were allowing him only 7% or 8%, as the case might be?

480 A. Yes, sir. I did just like the others did. They were selling at 10 off and I would sell at ten off, counsel.

Q. Was the Cunningham Company selling at 10 off?

A. I don't know.

Q. Why did you say the other men in the association were selling at 10 off?

A. From the report of our men and customers who came to see me.

Q. Was Krull and Company selling at 10 off?

A. From what I understand from salesmen, customers who purchased from Krull said so.

Q. You took the word of salesmen rather than Mr. Krull?

A. Yes; and customers too.

Q. Wasn't this your reason: You were afraid if the American Tobacco Company knew you were selling at a discount better than the discount of the association you would be cut off from the direct list of the American Tobacco Company?

A. No, sir.

Q. Isn't that one reason why?

A. No, sir.

Q. Isn't another reason if the Lorillard Tobacco Company knew you were selling at a discount better than the discount allowed by the association, you would be cut off its direct list—if they found you were selling at a better discount than agreed upon by the association?

A. I don't know anything about that.

Q. You saw Mr. Hill, president of the American Tobacco Company in 1921?

A. I presume I did—I was over there.

Q. Did you?

A. I guess I did.

Q. How often did you see him in 1921?

A. I really could not tell you that.

481 Q. While you were a member of the association, did you see him?

A. I guess I did.

Q. Did you or did you not?

A. I just can't recall dates.

Q. You can't tell us whether you were a member of the association at any time when you saw Mr. Hill in 1921?

A. I believe I was a member of the association when I saw Mr. Hill.

Q. Did you tell Mr. Hill you were a member of the association?

A. I can't recall that.

Q. Did Mr. Hill ask you anything about the association?

A. No; I think I told Mr. Hill about the association.

Q. What did you tell him?

A. I told him about the association in Philadelphia and he says to me, you don't know anything about the association. You don't know anything about association.

Q. I didn't ask you what Mr. Hill told you; what did you tell Mr. Hill?

A. I merely explained about the association.

Q. Just tell us what you told him.

A. I can't remember.

Q. You don't remember what you told Mr. Hill?

A. No.

Q. You are positive you don't remember what you said to him?

A. No, sir; only that the association, I might have told him, was getting along.

Q. Did you tell him the association had agreed upon a maximum discount?

A. I could not answer that.

482 Q. After the association was formed, and while you were a member of it, did Mr. Hill, president of the American Tobacco Company, say to you in New York that you should go along with the association and do whatever the association was doing? Didn't he tell you that?

A. I can't recall that, counsel.

Q. Didn't you tell me on Tuesday of this week in this room that Mr. Hill, while you were a member of the association, told you you should go along with the association and do whatever it did. Didn't you tell me that on Tuesday? Answer me yes or no?

A. If I told you that, counsel—

Q. I didn't ask you for any explanation. I am asking you whether you did or did not tell me that; did you not tell me in this room on Tuesday of this week that Mr. Hill, president of the American Tobacco Company, told you in New York you should go right along with the association and do whatever the association did?

A. No, sir; Mr. Hill never spoke that way.

Q. Did you not on Tuesday of this week, in this room, tell Mr. Haas, my associate, that Mr. Hill, president of the American Tobacco Company, told you in New York that you should go right along with the association and do whatever the association was doing?

A. If it would make more money—I don't know what it was.

Q. I am asking you whether you didn't tell that to Mr. Haas on Tuesday of this week?

A. I don't remember that, counsel.

483 Q. Do you mean you may have told Mr. Haas that but you don't remember?

A. Yes, sir.

Q. Do you mean to say in reply to my question, that you might have told it but don't now remember it but that you may have told him that on Tuesday?

A. It might be—I can't remember.

Q. Isn't it a fact on the 21st day of October, 1921, at 201 Market Street, Camden, N. J., you told Mr. Cowie, the examiner of this commission, that Mr. Hill, president of the American Tobacco Company, said to you in New York, while you were a member of the association that you should go right along with the association and do whatever the association was doing? Didn't you say that to Mr. Cowie at that time and at that place?

A. Well, I might have told Mr. Cowie that; I don't remember.

Q. If you did tell Mr. Cowie that you were telling the truth?

A. Yes; Mr. Hill might have told me if they are making money, go ahead and make money.

Q. You think you did tell Mr. Cowie that?

A. Counsel, that has been so long, honestly, and I have so much to contend with, I can't remember those things.

Q. How is it you remember so little when I am examining you and you were able to remember everything asked you about the American Tobacco Company when Mr. Walsh was examining you?

484 Mr. WALSH. I object to that as a highly improper question. That is a question for the commission to decide.

Mr. SMITH. On direct examination of this witness he was able to remember nothing concerning what took place at the Bourse Building in Philadelphia, except that they had a spat——

The EXAMINER. Gentlemen, I think that is not the proper time to discuss this.

Mr. SMITH. Your honor, I want to reply to Mr. Walsh's statement. When he was asked on cross-examination by Mr. Walsh whether the American Tobacco Company's name was mentioned he said positively it was not. It seems strange to me he was unable to remember any of those things on his direct examination.

Mr. WALSH. May we have that question stricken from the record physically?

The EXAMINER. I will not strike out the question.

Q. Do you remember if your orders to the American Tobacco Company were delayed in September, 1921, or not filled?

A. No, sir; I do not.

Q. Do you remember going over your orders for September on the witness stand yesterday afternoon?

A. Yes; I remember that.

Q. Do you remember that your shipments were delayed in September?

A. I could not remember that.

Q. You don't remember that?

A. No.

485 Q. Do you remember that from having gone over here yesterday the dates of the giving of the orders and their acceptance by the American Tobacco Company?

A. You spoke about it, did you not, counsel?

Q. That is very likely, Mr. Witness, but I am asking you whether you don't recall from your giving dates of the orders and the dates of their acceptances, whether you remember the delay?

A. I gave you all the invoices.

Q. Don't you remember there was a delay in shipments in September, from going over the invoices?

A. I don't remember that.

Q. Have there been delays or were there delays in September, 1921, in your shipments from the American Tobacco Company?

A. I could not remember that, counsel.

Q. You don't remember?

A. No, sir; because all shipments have been slow in coming in all around.

Q. And that was particularly true in September of 1921?

A. That is so far off I could not tell you that.

Q. What was the longest delay in shipments from the American Tobacco Company? What was the longest delay you had in 1921?

A. From Louisville, I guess three or four weeks.

Q. You had delays in shipments in 1921 from the American Tobacco Company for three or four weeks?

A. I really could not answer that question.

Q. Does the American Tobacco Company ship to you from Louisville?

A. Plug tobacco.

486 Q. Where does it ship other things from?

A. New York and Brooklyn.

Q. What is the longest delay you have had in the shipments from the American Tobacco Company from New York or Brooklyn with respect to the date you gave the order?

A. I never took any interest in any of that stuff.

Q. You didn't?

A. No; I never even took any interest in any of that stuff; I don't even handle that.

Q. Who does handle that? I understood yesterday from your testimony you were the member of the firm who did.

A. No; I have clerks to handle all that, incoming freight and outgoing stuff.

Q. Do I understand you are not interested in the prompt arrival of your goods?

A. Well, yes, sir; yes, sir.

Q. You did say a short time ago there were delays in the American Tobacco Company shipments in 1921?

A. Yes, sir.

Q. I am trying to find out from you the greatest delay you had in shipment from the American Tobacco Company in 1921?

A. I could not answer that; I don't know.

Q. There were delays?

A. Yes, sir.

Q. Were there unusual delays in 1921?

A. Not to my recollection.

Q. Did you have a delay in shipment or receipt of goods from the Lorillard Company in 1921?

A. No; I can't answer that either.

Q. You don't remember that either?

A. No, sir.

487 Q. Do you remember there was one month in 1921 when your shipments from the Lorillard Company were less by far than any other month?

A. No; I never even looked it up.

Q. Don't you know that in September, 1921, you received less from the Lorillard Company than in any other month last year?

A. No; I can't remember.

Q. Don't you remember you received less from the American Tobacco Company in September than in any month last year—or in any month in the last five years?

A. No, sir; I don't remember that.

Q. You don't remember that?

A. No, sir.

Q. Do you know now that you were dropped from the list of the American Tobacco Company?

A. No, sir.

Q. You don't know that?

A. No, sir.

Q. Although you were in the room yesterday when the letter was read which stated you were dropped?

A. Yes; that is the first I knew of it.

Mr. WALSH. He don't know it now and there is nothing in evidence to show that he was ever dropped.

Q. Mr. Murphy, if you were dropped from the list of direct buyers from the American Tobacco Company to-day, would it affect your business?

A. Well, counsel, the only way I could answer that is we carry a pretty good stock and the American Tobacco Company's goods is not selling like they used to.

488 Q. There is a demand for their goods though?

A. Yes; and if I didn't have the stock it would not worry me.

Q. If you were dropped from the direct list of the Lorillard Company?

A. It would apply the same—the tobacco business is a joke.

Q. You are not making money now?

A. No.

Q. How much do you owe the American Tobacco Company?

A. I don't know offhand.

Q. Can't you tell us how much you owe the American Tobacco Company on open account?

A. I can't tell you that just now.

Q. You owe them some money?

A. Yes, sir.

Q. Do you owe the American Tobacco Company for loans to your firm?

A. No, sir.

Q. How much do you owe the Lorillard Company?

A. I don't know. I know I owe them a good bit.

Q. Can you tell us approximately how much?

A. No.

Q. Is there anything you owe the Lorillard Company except on open account?

A. That's all.

Q. And that applies to the American Tobacco Company?

A. Yes, sir.

Q. You can't tell us the amount you owe the American Tobacco Company?

A. No.

Q. Can you tell us within a thousand dollars?

A. No.

Q. Within \$5,000?

A. We have always got stuff coming and going.

489 Q. Can you tell us within \$5,000 the amount of your indebtedness to the American Tobacco Company on open account?

A. I might say about \$15,000.

Q. Can you tell us the amount you owe the Lorillard Company on open account within \$5,000?

A. I would say about the same.

Q. Are those amounts greater or less than they usually are—that is, as to the amounts you owe to these companies on open account?

A. Less; considerably less.

Q. Do you know Charles C. Auld, of the Lorillard Company?

A. Yes, sir.

Q. Did you visit the Lorillard Company in New York in April, 1921?

A. I guess I did. I really could not tell you.

Q. Who did you see there?

A. I generally stop and see all the officers in there.

Q. Did you see Mr. Maloney?

A. I guess I did.

Q. Did you see Mr. Belt?

A. Sometimes they are in and sometimes they are out of town.

Q. On this occasion did you see either or both of these gentlemen?

A. I could not tell you on that date.

Q. You had a letter from the Lorillard Company dated April 2, 1921, asking you to call to see Mr. Maloney and Mr. Belt, did you not?

A. Yes, sir.

Q. And you were asked to call on those gentlemen at the office of P. Lorillard & Company on Tuesday, April 3, 1921, or surely
490 by Wednesday, the 6th of that month and year?

A. I guess that is true.

Mr. CALDWELL. I have no objection to the letters being put in evidence, but I do object to Mr. Smith's reading from the letter before it is put in.

Mr. SMITH. But I am not reading from the letter. There is nothing on the record to indicate that I am reading from the letter.

Q. What did you and Mr. Maloney discuss?

Mr. CALDWELL. Objected to on the ground that it is not redirect examination of anything whatever we asked on cross-examination. In accordance with you honor's ruling yesterday it should not be admitted.

(Objection overruled.

Exception.)

Q. I think you said you did call and see either one or both of those gentlemen?

A. Yes, sir.

Q. What did you talk about?

A. Well, Mr. Maloney was talking about money, what I owed—to my best recollection. I don't recall everything.

Q. Did you talk about the association?

A. No.

491 Q. That was not mentioned?

A. It might have been mentioned, but I can't remember.

Q. Did you discuss the association with Mr. Belt?

A. I can't recall that either.

Q. Do you remember that?

A. No, sir.

Cross-examination by Mr. CALDWELL:

Q. Will you please let me see this letter to which reference has been made, of April 2, 1921, from the Lorillard Company?

Mr. SMITH. Mr. Examiner, I don't think I am obliged to produce a letter to the gentleman on the other side, which I have not shown to the witness or examined the witness on.

By Mr. CALDWELL:

Q. Mr. Murphy, you have stated there was a letter of April 2, 1921. Is not that your own personal letter?

A. I can't answer that, counsel.

Q. You handed to Mr. Smith a bunch of your correspondence?

A. Yes, sir.

Q. And among those was a letter of April 2, 1921, from the Lorillard Tobacco Company from which Mr. Smith made reference?

A. Yes, sir; I judge so.

Q. Have you any objection to my seeing that letter?

A. That is up to counsel.

Q. Have you any objection to my seeing that letter?

A. No, sir.

492 Mr. CALDWELL. I ask permission to see that letter.

Mr. SMITH. Mr. Examiner, there is nothing to conceal about this letter. It is a letter from Charles C. Auld, dated April 2, 1922, to Mr. James Murphy, of Murphy Brothers, Camden, N. J. Now, since I have been asked to produce this letter I will be glad to give it to the gentleman. [Letter in question handed by Mr. Smith to Mr. Caldwell.]

Mr. CALDWELL. I offer in evidence the typewritten part of this letter which is on the front page. There is some scrawling on the back of it that I can't read and which is no part of the letter and does not refer to it, and I do not offer that in evidence.

Mr. SMITH. While I have a valid objection to the offer of this letter, there is no reference to the letter or its contents in the record, I waive the objection which I think I have; but I ask, in view of the fact that there is an additional personal letter to or from Mr. Murphy on the back of that letter, that this letter be copied in the record so that the letter may be returned to Mr. Murphy.

The EXAMINER. The letter is received and will be copied on the record, as follows:

493 P. LAURELLARD COMPANY
119 West 40th Street

NEW YORK, April 2, 1921.

Mr. JAMES MURPHY,

c/o Murphy Brothers, Camden, N. J.

DEAR SIR: I called you over long-distance telephone to-day and was sorry to learn of your being ill and away from business, but trust you will be as well as usual by the beginning of next week. Mr. Maloney and Mr. Belt desire to see you as early as possible and I trust you will be able the 5th inst., or surely by Wednesday, the 6th, and would thank you to advise me if you should be well enough to come here by that time.

Wishing you a speedy recovery, and with kindest regards, I am,

Very truly yours,

CHARLES C. AULD.

By Mr. CALDWELL:

Q. And in response to that letter, your best recollection is you went to New York and saw either one or both of these people?

A. I seen Mr. Maloney.

Q. What is your best recollection as to whether or not you discussed credit conditions to call on them at this office by
494 Tuesday, with him in your account?

A. No, sir; I can't remember that.

Q. I hand you a letter dated May 6, 1921, addressed to Murphy Brothers, Camden, N. J., and ask you whether or not that re-

freshes your recollection as to calling on this prior occasion in reference to credit conditions of your account? Does that letter refresh your recollection?

A. Yes, sir; that is correct.

Q. Is your best recollection, after it has been refreshed, that the object of your visit in response to the letter of April 2nd was in order to discuss the credit condition of your account with the Lorillard Company?

A. Yes, sir.

Q. And the Lorillard Tobacco Company was a little uneasy about the amount of money you owed them at that time and wanted to see what arrangements you could make in reference to it, were they not?

A. Yes, sir; I would say so.

Q. And you have on other occasions had the same condition in your account and made visits to New York to see the Lorillard people about it?

A. Yes; when I went over to New York I would speak on that same occasion.

Q. It was nothing unusual for you to go to the Lorillard office about your account?

A. No, sir.

Q. You did that prior to 1920, and you were still doing it from time to time?

A. Yes, sir.

Q. Did you receive from the Lorillard Tobacco Company the original of that letter of May 6?

A. If they sent it I got it.

Q. Have you received it and have you turned it over to 495 Mr. Smith among your other correspondence?

A. I really could not say that.

Q. Have you turned over all your correspondence from the Lorillard Company for the years 1920-21 to Mr. Smith?

A. Yes, sir; what we had there; if there were any got mislaid I don't know.

Mr. CALDWELL. I offer in evidence that letter of May 6, 1921, addressed to Mr. James Murphy, c/o Murphy Brothers, Camden, N. J., but first I will ask Mr. Smith if he will produce the original if he has it.

Mr. SMITH. First of all, I object to the admission of this copy, as I understand it was used to refresh the recollection of the witness. As to the second proposition, I can say this: I don't think the original of it (this carbon copy) has ever been in my possession. However, if it is, the other side is welcome to it.

Mr. CALDWELL. I would like to make this statement on the record. I did not mean at all, nor was it ever in my thought, that Mr. Smith was in any way suppressing any letters or documents of any kind and that is not my thought at all, and I do not believe it to be the fact.

The EXAMINER. The letter is admitted and will be marked "Respondent's (Lorillard Co.) Exhibit No. 1."

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Cross-examination by Mr. WALSH:

Q. Mr. Murphy, I understand from Mr. Smith's questions to you that at some time or other you had a conversation with Mr. Hill—that is, while you were a member of the association?

A. Yes, sir.

Q. Can you place the date of that conversation in any way?

A. No, sir; I really can not.

Q. But it was while you were a member of the association?

A. Yes.

Q. Can you recall what generally the discussion was between you and Mr. Hill?

A. No, sir; I can't.

Q. Isn't it a fact that Mr. Hill never told you that you should go along with the association, or used that expression, go along with the association?

A. No, sir; he never did.

Q. Did not Mr. Hill at that time tell you he didn't care anything about the association or what it did?

A. I don't know if it was at that time, but he told me I should run my own business, and he doesn't know anything about the association, I recollect.

Q. Mr. Hill said he ran his own business?

A. I ran my own business. He didn't know anything about the association. He didn't bother his head about the association.

Q. He told you he didn't know anything about the association?

A. He didn't bother his head about the association; he didn't know anything about it or something.

497 Q. At any conversation that you had with Mr. Hill at any time, did Mr. Hill say directly or indirectly that he would, or his company would, in any way support anything that the association did?

A. Never mentioned that to me; no, sir—as far as I can remember.

Q. Mr. Cowie, a representative of the Federal Trade Commission, came and interviewed you at one time?

A. Yes; but he didn't have much of my time.

Q. Did he ever give you a copy of the report he made to the Federal Trade Commission?

A. No, sir; not to my recollection.

Q. You never saw any such report?

A. No, sir.

Q. You have been subpoenaed here by the Federal Trade Commission to testify?

A. Yes, sir.

Q. And to bring your books and papers?

A. No books; just bills and letters.

By Mr. CALDWELL:

Q. You are getting from the Lorillard Company all the goods you want now at the present time?

A. Yes, sir.

By Mr. WALSH:

Q. That is true of the American Tobacco Company?

A. Yes, sir.

498 Redirect examination by Mr. SMITH:

Q. Do you know of any reason why the Lorillard Company would have written you on April 2, 1921, stating they wanted you to call to see Mr. Maloney or Mr. Belt and not have told you in this letter which has been made an exhibit that they wanted to see you about credit, if that was the reason they did want to see you?

A. Yes, counsel; I would say they have always been mailing me statements, and I have not been bothering my head with them, and I guess they sent that to make me go over.

Q. And you say, although they did write you April 2, 1921, they wanted to see you about credit, and this letter of May 6, 1922, was more than a month afterwards?

A. Yes, sir.

Q. Did you get letters previous to May 6, 1921, regarding the amount of money you owed the Lorillard Company?

A. I had been getting them pretty near every week.

Q. Are you able to give us any reason why the Lorillard Company should not have said in this letter dated April 2nd, 1921, as to why Mr. Maloney and Mr. Belt wanted to see you?

A. No; I could not, outside of the statements they sent.

Q. There is nothing about statements in the letter?

A. No, sir.

(Adjourned for luncheon, to resume at 2.30 p. m. this afternoon, same place.)

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PHILADELPHIA, October 20, 1922.

(Met pursuant to adjournment, 2.30 p. m.)

J. B. BEVILL was called as a witness by the commission and upon examination by Mr. Smith testified as follows:

Direct examination by Mr. SMITH:

Q. Where do you live, Mr. Bevill?

A. 1009 Wesley Avenue, Ocean City, N. J.

Q. What is your business?

A. I am sales manager of the American Tobacco Company, section 2.

Q. How long have you been sales manager of the American Tobacco Company, section 2?

A. Approximately 3 years.

Q. What is section 2?

A. Section number two is—all States.

Q. Your territory?

A. It is called a section. There are six sections in the United States and I have one of them?

Q. What is the one you have?

A. It embraces the States of Virginia, West Virginia, Kentucky, District of Columbia, Maryland, Delaware, Pennsylvania.

Mr. SMITH. At this point, Mr. Examiner, I desire to read into the the record telegram dated February 28, 1921, from Philadelphia, by Mr. Beville, this witness, to Mr. George W. Hill, of the American Tobacco Company, as follows:

500 " PHILADELPHIA, February 28, 1921.

Mr. GEORGE W. HILL,

Vice president the American Tobacco Company,

111 Fifth Avenue, New York.

Mr. O'Boyle will be at your office at 9 o'clock to-morrow, Tuesday morning, to discuss the question of Philadelphia subjobbers. Stop. I will thank you to see him as early as possible as Committee appointed by the Philadelphia jobbers will be there to see you later in the morning. Stop. I have arranged for Red, White and Blue with Weiss, or I would have accompanied Mr. O'Boyle; nevertheless, I am sure he can give you the necessary information and, of course, your decision in the matter will be final and satisfactory to me.

Signed: J. B. BEVILLE."

On the left is:

"Charged to T. F. O'Boyle, 321 Heed Building, Philadelphia, Pa."

Q. Where did you get the information that a committee of the Philadelphia jobbers was going to call upon Mr. Hill on March 1, 1921, when you sent this telegram?

A. It is impossible to reply to that; I could not tell you.

501 Q. Have you seen a copy of this telegram?

A. Yes, sir.

Q. When did you see it?

A. I saw it one day this week.

Q. Who showed it to you?

A. Is it in the files on the table.

Q. I asked you who showed it to you?

A. Mr. Walsh showed it to me.

Q. When was the last time, prior to this occasion this week, you saw that telegram or a copy of it?

A. To the best of my knowledge I never saw a copy of it before.

Q. When did you last see the original of the telegram?

A. I don't believe I ever saw the original of it.

Q. Was that because you dictated the telegram?

A. Yes, sir.

Q. Do you remember now that you sent the telegram?

A. No, sir.

Q. You don't recall having sent the telegram?

A. No, sir, I don't recall having sent the telegram.

Q. Did you know that there was an association of tobacco jobbers in Philadelphia—did you know that in February, 1921?

A. Yes, sir.

Q. How did you find that out?

A. Through my own men that represent the American Tobacco Company here in Philadelphia.

Q. Who was the committee of Philadelphia jobbers that was to meet Mr. Hill on March 1, 1921?

A. I don't recollect any committee.

Q. What are the names of the men who were, according to 502 this telegram, to meet Mr. Hill on Tuesday, March 1, 1921?

A. I don't recollect having heard the names of any men.

Q. Did you ever notify Mr. Hill in the past two or three years that any other committee or any other jobbers' association was going to call upon him?

A. I don't recall having done so.

Q. Is your memory good?

A. Fair.

Q. Did you ever at any time during the period that you have been sales manager for section No. 2 inform Mr. Hill that any other committee of any other jobbers' association was going to call on him?

A. I don't recall having done so.

Q. This is the only occasion—this telegram of February 28, 1921—when, according to your recollection, you did send such notice?

A. I don't even recall sending that one.

Q. You don't deny, as I understand you, you did send it?

A. I don't deny it; no, sir.

Q. How frequently do you wire Mr. Hill?

A. Well, whenever the occasion arises.

Q. How frequently is that?

A. It may be twice a day; it may be four times a day; and it may be once in a year.

Q. How many times in the last year, if your memory is still fair, have you wired to Mr. Hill?

A. That would be impossible for me to tell.

Q. Because you don't remember?

A. There would be no possible way for me to remember.

Q. Did you telegraph to Mr. Hill yesterday?

A. No, sir.

Q. Did you last week?

A. No, sir.

Q. The week before last?

A. I could not tell you.

503 Q. Do you remember as far back as week before last?

A. About some things.

Q. Do you remember sending a wire to Mr. Hill, week before that?

A. No, sir.

Q. By that do you mean you didn't send a wire to Mr. Hill week before last?

A. I don't remember.

Mr. WALSH. Mr. Examiner, I object to this line of examination.

Mr. SMITH. This witness seems to be suffering from a lapse of memory this afternoon and I am trying to get at the facts.

Mr. WALSH. I object to counsel's badgering this witness about his memory.

The EXAMINER. The objection is overruled, gentlemen; proceed with the examination.

(Exception.)

Q. What do the words "red, white, and blue" appearing in this telegram mean?

A. It is a development report that is worked by a man under my supervision on one of his men, as to the plan of our selling organization.

Q. Is that expression still in use by the American Tobacco Company?

A. Yes, sir.

Q. Who is the Mr. O'Boyle mentioned in this telegram?

A. Mr. O'Boyle at that time acted as assistant to myself in charge of the Philadelphia territory.

Q. Who was "Weiss" mentioned in this telegram?

A. He held a similar position in charge of western Pennsylvania, in Pittsburgh.

264 Q. What was the question of Philadelphia sub-jobbers that Mr. O'Boyle was to discuss with Mr. Hill?

A. I just can't remember. I can't recall it.

Q. What was the necessary information that Mr. O'Boyle was to give Mr. Hill?

A. I can't recollect it, sir.

Q. What was the matter that was to be decided by Mr. Hill with which you say in the telegram you will be satisfied?

A. I can't recall, sir.

Q. Did Mr. O'Boyle go to New York on March 1, 1921?

A. I could not tell you, sir.

Q. Is it because you can't remember?

A. I would have no way of knowing if he did.

Q. Was there any occasion excepting the one mentioned in this telegram when Mr. O'Boyle went to New York to discuss with Mr. Hill the sub-jobbers of Philadelphia?

A. I don't recollect Mr. O'Boyle having been there at any time.

Q. Did you ever discuss with Mr. O'Boyle the question of the Philadelphia sub-jobbers?

A. Not that I can recall.

Q. Did you ever discuss with Mr. O'Boyle the question of Philadelphia sub-jobbers?

A. Not that I can recall.

Q. Is Mr. O'Boyle still connected with the American Tobacco Company?

A. No, sir.

Q. When did his connection with the American Tobacco Co. cease?

A. I think it was October 1, 1921.

305 Q. Was he discharged or did he resign?

A. It was a mutual understanding.

Q. What do you mean by that; a discharge or resignation?

A. We have a rule of accepting a man's resignation rather than to ask his dismissal.

Q. And you accepted Mr. O'Boyle's resignation on what date?

A. I suppose it was effective October 1, 1921.

Q. It became effective October 1, 1921?

A. It became effective then.

Q. When did he tender his resignation?

A. I would say just a few days prior to that.

Q. You remember that, do you? You remember he resigned a few days before?

A. To the best of my recollection.

Q. You remember his resignation took effect October 1, 1921—over a year ago?

A. Yes, sir.

Q. And you don't remember whether you and Mr. O'Boyle discussed Philadelphia jobbers of tobacco?

A. No, sir; I do not.

Q. Did you ever discuss with Philadelphia jobbers the selling of American Tobacco Company products by Philadelphia jobbers?

A. Yes; every one of them.

Q. Do you know them all?

A. Practically all of them.

Q. Was Mr. Eberbach of the A. B. Cunningham Company one of the committee mentioned in this telegram?

A. I know of no committee that was appointed or mentioned.

Q. Was Mr. Eberbach one of the men whom you meant by
306 this telegram as a committee appointed by the Philadelphia jobbers to see Mr. Hill?

Mr. WALSH. I submit, your honor, the witness has already answered the question.

The EXAMINER. Let him answer.

A. I don't recall any committee or I don't recall any names of men who were on committees.

Q. Do you remember whether Mr. Krull was one of the men who, according to this telegram, was to see Mr. Hill on March 1, 1921?

A. No, sir; I don't recall.

Q. You don't recall any of the men?

A. No, sir.

Q. You don't recall the name of any of the men, Philadelphia jobbers, who were, according to this telegram, to see Mr. Hill?

A. No, sir; I don't.

Q. Are you a stockholder in the American Tobacco Company?

A. Yes, sir.

Q. How long have you been a stockholder?

A. About 7 years.

Q. Do you know whether the American Tobacco Company controls the American Cigar Company?

A. No, sir; that I don't know.

Q. What was the day that you last saw the copy of this telegram in this room?

A. I only saw it one day and I believe that was on Tuesday.

Q. Tuesday of this week?

A. Tuesday of this week.

307 Q. Since the time you saw that copy, Tuesday of this week, have you tried to find out the names of the Philadelphia jobbers who, according to this telegram, were to meet Mr. O'Boyle on March 1, 1921?

A. There was no effort to find out anything. I knew of no committee nor any men by name and I paid no attention to it.

Q. I didn't ask you that. I asked you, since you saw this copy of the telegram on Tuesday of this week, have you tried to find out the names of the men who constituted the committee to see Mr. Hill on March 1st, 1921?

A. I have not sought any information from anyone.

Q. In other words, you have not tried to find out from anyone?

A. No, sir.

Q. Did I understand you to say you wired Mr. Hill this week?

A. No, sir.

Q. When did you last wire him?

A. I said I could not recall.

Q. I think you said you did not wire him last week?

A. That is correct.

Q. Did the American Tobacco Company have an office in the Reed Building in Philadelphia in 1921?

A. No, sir.

Q. Did Mr. O'Boyle have an office there?

A. Yes, sir.

Q. Do you remember what the room number was?

A. 321 and 322.

Q. How long was that Mr. O'Boyle's address?

A. I could not tell you off hand.

Q. Did he have it up to the time of his resignation?

A. Yes, sir.

308 Q. He had that office up to the time his resignation was accepted?

A. Yes, sir.

Q. When did Mr. O'Boyle commence his duties under that position with the American Tobacco Company?

A. In Philadelphia?

Q. Yes.

A. I could not tell you off hand.

Q. Did you ever hear that a committee of Philadelphia jobbers or that Philadelphia jobbers did interview Mr. Hill on March 1, 1921, in New York?

A. No, sir.

Q. Did you ever ask Mr. Hill whether a committee of Philadelphia jobbers or whether Philadelphia jobbers did confer with him in New York on March 1, 1921?

A. No, sir.

Q. Do you make a weekly report to the American Tobacco Company?

A. No, sir.

Q. Do you make a report weekly on conditions?

A. No, sir.

Q. Do you report at all to the American Tobacco Company?

A. When I visit the New York office—personally.

Q. All of your reports are oral reports?

A. Yes, sir.

Cross-examination by Mr. WALSH:

Q. Mr. Bevell, this telegram that has been read into the record on Mr. Smith's direct examination—you stated in your reply to his question that you do not recall the sending of the message or anything relative to the facts therein contained, about the committee going to New York to meet Mr. Hill and speaking to him in reference to sub-jobbers. That is correct?

509

A. That is correct.

A. That is correct.

Q. And you stated the first time you recall seeing this telegram was here on Tuesday?

A. That is correct.

Q. And that you found it in the files here?

A. Yes, sir.

Q. Did you, or did you not, call my attention to the telegram when you found it?

A. I don't believe I called it to your attention.

Q. Or did I call it to your attention?

A. You did call it to my attention.

Q. Did I ask you about the circumstances?

A. You merely asked me had I seen it before.

Q. Did I ask you anything else about it?

A. And was I familiar with it.

Q. What did you say?

A. I didn't recollect it and so told you.

Q. Did I ask you about the circumstances connected with this telegram?

A. I told you I could not recollect it or any part of it.

Q. Didn't I ask you for the names of the committee who were supposed to go to see Mr. Hill?

Mr. SMITH. I object to that question and all those similar questions. What difference does it make what he asked him.

The EXAMINER. Mr. Walsh has a right to ask him about where he saw the telegram.

310 Mr. WALSH. The proposition was whether or not this witness made an effort to recall the circumstances relative to what was contained in this telegram.

The EXAMINER. I will let you proceed on it.

Mr. CALDWELL. I move to strike out the telegram as against the Lorillard Tobacco Company as, of course, having no binding force on the Lorillard Company.

The EXAMINER. Motion denied. Exception.

Mr. TAULANE. I move to strike out on behalf of the other respondents as not binding on them.

(Motion noted. Denied. Exception.)

By Mr. WALSH:

Q. The Heed Building—is that a prominent building in Philadelphia?

A. It is an office building in the city of Philadelphia.

Q. Did you go to Mr. O'Boyle's office often?

A. Quite frequently.

Q. Why are you able to recall the number of the rooms in that office building?

A. I have always authorized every man in a similar position under my supervision to rent an office similar—a small office in some given point, which is known as "headquarters," a point where men may come and where mail may reach him.

Q. Was that the headquarters at that time?

A. That was the headquarters at that time.

311 Mr. HARVEY D. NARRIGAN, sworn by the examiner.

Direct examination by Mr. SMITH:

Q. Where do you live, Mr. Narrigan?

A. 101 Woodside Avenue, Narberth, Pa.

Q. Are you a wholesale dealer in tobacco products?

A. Yes, sir.

Q. Where is your place of business?

A. 118 North 6th Street, Philadelphia, Pa.

Q. Under what name do you trade?

A. Harvey D. Narrigan & Company.

Q. Is that business owned by you?

A. Yes, sir.

Q. What all do you deal in?

A. Tobacco products, candies, and a few novelties.

Q. Do you have any objection to telling the yearly volume of your business?

A. Yes, I object.

Q. And because you object, I won't ask you that.

A. Thank you.

Q. Do you buy direct from the large tobacco manufacturers?

A. Yes, sir.

Q. Will you name the large manufacturers that you buy from direct?

A. The American Tobacco Company; W. Duke Sons; R. J. Reynolds; P. Lorillard & Company.

Q. How long have you been buying from those companies? Approximately, have you been buying from those companies, all of them, for the past ten years?

A. Yes, sir.

512 Q. Where do you resell the products you buy from those companies?

A. The tobacco products? In Philadelphia.

Q. Do you sell to the retail trade?

A. Yes, sir.

Q. Do you conduct a retail business yourself in the tobacco line?

A. No, sir.

Q. Your business in that respect is all wholesale?

A. We have a State license for retailing. Very frequently a man will come in there selling or even for the purpose of soliciting orders and ask for a pack of cigarettes. If we did not have that license we would not be permitted to sell him that, and in order to protect ourselves in that we have a retail license.

Q. But you don't conduct a retail business?

A. No, sir; we do not solicit it and we do not care for it.

Q. Were you a member of the Association of Wholesale Tobacco Dealers of Philadelphia?

A. Yes, sir.

Q. When did you join, Mr. Narrigan?

A. I can't give you the date, but I am willing to admit the fact that I was one of the original members.

Q. Immediately prior to the organization of the association what were the discounts being allowed by wholesalers in Philadelphia?

A. Well, from 5% up to 11%, and in some cases 10 and 2.

Q. Were you present at the meeting of the association at which it adopted a resolution fixing the maximum discount at 8%?

513 A. I was at the meeting when that resolution was considered.

Q. It was adopted at some meeting, wasn't it?

A. No doubt; it was.

Q. Upon the adoption of that resolution, did you live up to it?

A. Yes, sir.

Q. Were you present at the meeting when the maximum discount was changed from 8% to 7%?

A. Yes, sir.

Q. When the maximum discount was fixed at 7% by the adoption of this resolution, did you live up to the terms of that resolution?

A. That is up to the 7% proposition, in some cases.

Q. You don't understand me, Mr. Narrigan. I will just repeat the question. Upon the adoption of the resolution changing the maximum discount from 8% to 7%, did you live up to the 7% maximum discount?

A. Yes, sir; I lived up to the 7% maximum.

Q. And that is what you meant to say before?

A. Yes, sir.

Q. Do you remember the selection of Mr. Kane as investigator?

A. I knew nothing of Mr. Kane being investigator for that association at all. I knew nothing about him as investigator until it was disclosed to me this week. I tried to find out who the investigator was, for my own information, but I never found out.

Q. Did you know there was an investigator?

A. I knew from what it was said.

Q. Was it part of the plan the members were not to know who the investigator was?

314 A. That is a very hard question to answer. If that were so, they would not acquaint me.

Q. You didn't know the name of the investigator?

A. No.

Q. But you were curious to find out who he was?

A. Yes, sir.

Q. Did you ask anyone in the association?

A. Several.

Q. Who were they?

A. I asked Mr. Borgan and Mr. Eberbach and I conjured on the subject with Mr. Gordeski, but I could not get any information before I received the information here, this week.

Q. Mr. Eberbach did not disclose the name of the party?

A. No, sir.

Q. And neither Mr. Borgan nor Mr. Gordeski disclosed it to you?

A. No, sir. None of them seemed to know anything about the party.

Q. At least that is what they told you?

A. Yes, sir.

Q. Do you remember that Murphy brothers, of Camden, were members of the association?

A. Yes, sir.

Q. Do you remember their having resigned from the association?

A. Well, I don't know whether it was a "resignation" or a "withdrawal."

Q. You do not term it a resignation?

A. No, sir.

Q. Were you present when this withdrawal, resignation, or discharge took place?

Mr. CALDWELL. I object to the question; there is no testimony about a "discharge."

315 A. Yes, sir.

Q. Where was it, Mr. Narrigan?

A. In one of the private rooms of the Philadelphia Bourse Building.

Q. Were you here this morning when Mr. Murphy said there was a "spat"?

A. Yes, sir.

Q. Tell us, if you please, the details of the "spat."

A. That day, a number of the members of the association met there for a dinner, which was customary once a week, and just at the time we got through with the dinner and were ready to part, the two Murphy brothers stepped into the room rather agitated and Mr. Eberbach asked the Murphys if they had anything to say and they started accusations against every man in the room for the very things they were charged with.

Q. And what was that?

A. That they were all breaking the combination price.

Mr. TAULANE. Who made that charge?

A. Mr. Murphy.

Q. He accused the other members?

A. Yes, sir.

By Mr. WALSH:

Q. Him or John?

A. I think it was John.

By Mr. SMITH:

Q. And I suppose the fight was on?

516 A. The fight was on and I denied the charge and with that quite a number of waiters rushed into the room and we thought it best to get out, which we did.

Q. Were you among one of those accused by Murphy Brothers or was it a general accusation?

A. A general accusation. That is why I took it up.

Q. You denied that you were guilty?

A. Yes, sir.

Q. And I suppose some others there denied they were guilty?

A. No sir; not to my knowledge.

Q. You were looking after your own interests?

A. I was looking after myself.

Q. Did you ever receive any price notices from the association?

A. I think I received one.

Q. Do you remember what that was about?

A. I think that was about the 7% proposition.

Q. But do you remember receiving any notice on the price of the Beechnut cigarettes from the association?

A. Not from the association. I don't recall it.

Q. Do you remember ever having a talk with a representative of the Lorillard Company about the Beechnut brand of cigarettes?

A. Yes, sir.

Q. When was that?

A. I could not remember the date.

Q. Who was that representative?

A. Mr. Omara.

Q. What was the subject of that conversation with Mr. Omara?

A. He raised the question of the Beechnut cigarette not selling and I said, "We have two prices to contend with," and 517 he said, "What do you mean?" and I said, "Ordinarily we are giving 8% and your list calls for only 5%." Then he raised the question whether I thought if they would raise their discounts to meet the market conditions the trade would take on any better interest and I said in my opinion I thought it would.

Q. Do you remember whether that change was put into effect?

A. It was put into effect the following morning.

Q. You were one of the vice presidents of the association?

A. One of them.

Q. Did the association do anything with respect to that notice or act on the notice?

A. That was done during the absence of the president, Mr. Eberbach. Mr. Eberbach was out of town owing to illness; he had been ill for several weeks and his physician ordered him away and in the absence of Mr. Eberbach I simply took the position as I thought was due under the circumstances, and communicated at once to the secretary of the association the fact and he notified the members of the association of the change in the discount.

Q. At least you instructed the secretary of the association to notify the members?

A. Members of the association; yes, sir.

Q. Do you remember Lorillard Company discontinuing a discount on Turkish cigarettes at one time?

A. That happens quite frequently. They discontinue what they call a deal.

Q. Do you remember in 1921, that there was a change in discount on Turkish cigarettes?

518 A. There may have been. It is not a question of discount. It is so much per thousand.

Q. Do you remember that change in June, 1921?

A. No; I don't remember what that was. Sometimes they last two weeks; sometimes they last two months; and sometimes they last 519 too long.

Q. Do you remember whether there was a 36¢ or a 35¢—

A. It is 35¢ a thousand—not 35%.

Q. Was that the one in June, 1921?

A. I could not say the date. I have a copy of that circular at the store. If I had thought it was necessary I would have brought it 520 down.

Q. Do you remember any instructions given by the association to Mr. Eberbach?

A. In what way? In reference to what?

Q. With reference to calling upon tobacco manufacturers?

A. No, sir.

Q. Do you remember that the association instructed Mr. Eberbach to call on the American Tobacco Company and the P. Lorillard Company?

A. I know of no such instruction.

Q. Do you remember Mr. Eberbach ever reporting to the association about visits to the manufacturers?

A. No, sir.

Q. Did you bring along with you a copy of the report of an interview between you and Mr. Cowie?

A. I didn't. I didn't, Mr. Smith, from the very fact that I mislaid that with some other papers and I have been searching high and low for it.

Q. You remember the interview?

A. Yes, sir, I am willing to admit that.

519 Q. Do you remember after he wrote the interview up that he had with you, he left a copy of it at your place of business?

A. He didn't leave a copy, but about a month after, I suppose, I received a copy of the entire interview.

Q. Who did you receive that from?

A. I was in doubt about that until yesterday afternoon when my bookkeeper told me it came by mail. My bookkeeper said it came in by mail. I am willing to admit the fact that I received it and I also read a portion of it.

Q. Is that your recollection, that it did come in by mail?

A. Yes, sir.

Q. Is that your recollection, that it did come in by mail?

A. I will be frank about that; my mail very frequently is opened by my son and if I find a communication there I take it for granted that is the method of its reaching us. Yesterday the bookkeeper told me that communication came by mail.

Q. You have not seen the envelope?

A. No; I must have seen the envelope at the time because anything of that kind would be laid aside, but I don't recollect it was stamped.

Q. You think it is possible and it may have been in an envelope and mailed to you?

A. Well, I took it for granted she knew what she was talking about when she told me it came in by mail, but I know I received a copy.

Q. How long is it since you saw that copy?

A. I was taken sick back in June and I have not been at the store but on the average of two hours a day since. I have not seen this communication since June.

520 Q. June of this year?

A. June of this year.

Q. Do you remember whether Mr. Cowie left his address or the address of someone to communicate with?

A. In with this report there was a letter asking me to look over the contents and if I found any errors I should remail it, and I think the address was somewhere in New York.

Q. When you read the report over at the time did you find it to be correct?

A. I found several mistakes, but I thought they were of such small moment they could be explained if necessary.

Q. Do you remember what they were?

A. The volume of business, and another one was about the report of committees—there were three, I think, I saw on the two pages I read; I can't think what the third one was at the present moment, but it may come to me as we go along.

Q. Would you recognize a copy of that report if it were shown to you?

A. I think so.

Q. Will you look at these four sheets and see whether they are a copy, according to your best recollection, of that report?

A. Well, as I said, there are three points there—

Q. Are these four sheets an exact copy of the report Mr. Cowie gave you?

A. Now, there is an error on one of them—

Q. Is this a copy of the report?

A. I will have to admit that it is. As to the accuracy of it, that is another question.

Q. Yes. I think you said you admit you didn't communicate with the party in New York whose address was given, as to the errors?

A. I didn't; no, sir.

Q. Now, this report you notice said you had told Mr. Cowie that the jobbers' association instructed Mr. Eberbach, its president, to call on the American Tobacco Company, and the Lorillard Company?

A. I never understood any such thing. I didn't know of any such thing taking place.

Q. This report says Mr. Eberbach was to ask their officials—that is, the American Tobacco Company and P. Lorillard Company—to assist in maintaining the discount fixed by the association. Did you tell Mr. Cowie that?

A. No, sir; positively not.

Q. Or that Mr. Eberbach went to those companies?

A. Positively not.

Q. And that he later reported to the association they had agreed to do so? Did you tell Mr. Cowie that?

A. Positively not, sir.

Q. Do you know whether there was a committee of the association appointed to call on the manufacturers?

A. There was no committee of the association or committee at all, appointed by the association.

Q. Was there any committee of the association or committee of men, or members of the association, who did call upon the manufacturers?

A. No, sir, not to my knowledge. If they went there they went as individuals.

Q. But do you know that any went?

A. Only by rumor.

Q. Where did you get the rumor?

A. Among the members of the association.

522 Q. What did the members of the association say in that respect—that you classify as “rumor”?

A. It is a rumor that—

Mr. CALDWELL. I object to the admission of this evidence of rumor, as it is hearsay.

Mr. SMITH. Mr. Examiner, it is not hearsay.

The EXAMINER. Objection overruled. Exception.

A. It is a rumor that a committee was going to call on these various companies but I could never get anything positive.

Q. Was there also rumor among the members of the association that anybody had seen manufacturers?

A. No, I could not say that. In fact, I inquired myself of the people who were supposed to be over that and could get no information.

Q. Who were those people?

A. One of them went to New York. What his purpose was I don't know—Mr. Godeski. I understood Mr. Krull went over there and also Mr. Eberbach.

Q. Where did you get that information?

A. Simply among the members—what you might call “trade gossip”—and nothing positive was ever mentioned of that situation at the meetings.

Q. That was something like the name of the investigator?

A. Yes; just exactly.

Q. Was the rumor among the members of the organization that these three gentlemen had gone at separate times or had they gone together?

523 Mr. CALDWELL. I object to this testimony about rumors.
(Objection overruled.)

Exception.)

A. I had not heard that any of them had gone together.

Q. What manufacturing companies, according to these rumors you heard among the members of this association, had either one, or more of these gentlemen been to see?

Mr. CALDWELL. I object to any evidence as to “rumors” being received as against the Lorillard Company.

The EXAMINER. As I understand it, he means by “rumors” talk among the members.

Mr. TAYLOR. But not at the meetings?

The WITNESS. I had no information of the fact that they had been to see them, nor of the companies whom they were going to see; nor were the names mentioned whom they were to see.

Q. Was the name of any manufacturing company connected with these rumors?

Mr. CALDWELL. Same objection as to Lorillard.

(Objection overruled.

Exception.)

A. No, Mr. Smith.

224 Q. The rumors were that Mr. Godeski, Mr. Krull, and Mr. Eberbach had been to see these companies in New York?

A. No; had been to New York or were going to New York.

Q. "Had been to New York or were going to New York"?

A. Yes, sir.

Q. What was the business of these gentlemen in going to New York, according to the rumors?

Mr. CALDWELL. Objected to as to Lorillard Company.

(Objection overruled.

Exception.)

A. As business men they would not tell.

Mr. WALSH. I object on behalf of the American Tobacco Company to having this witness tell in reference to "rumors" unless it is confined to what he knew and heard.

The EXAMINER. I have ruled on that. He said rumors meant talk among the members of the association. Proceed with the examination, gentlemen.

By Mr. SMITH:

Q. Who do you mean "would not tell"—Mr. Godeski, Mr. Krull, or Mr. Eberbach?

A. In the first place I would not expect to get a favorable answer from Mr. Eberbach.

225 Q. Why?

A. Well, he is known as an "ice house," in our line of business, meaning cold.

Q. You mean cold and reticent?

A. Yes, sir; and Mr. Godeski—I don't think I asked him. And Mr. Krull—I did not ask him.

Q. Outside of these three gentlemen, what was the rumor among the members of the association as to their purpose in going to New York?

A. I heard nothing. I could get nothing from any of the members at all. In fact everything that governed us so far as our conversation went was entirely trade gossip.

Q. When you used the word "rumor"—you have used the word "rumor" Mr. Witness and I have used the word "rumor." When I used the word "rumor," did you understand me to mean, and did you intend to mean when you used the word "rumor," talk among the members of the association?

A. Talk among the members; yes, sir.

Q. Did you, yourself, ever go to New York?

A. I haven't been to New York for a couple of years.

Q. Were there ever, at any of these meetings of the association, or at any time prior to the association's going into session, or at any time immediately after this business session was over, occasions when representatives of the tobacco companies were present with you or more of the tobacco jobbers?

A. I can say positively, no.

Q. What committees were you on in the association?

326 A. Well, as vice president, I was ex officio member of the executive committee. I think that is about the only committee.

Q. Where did the executive committee hold its meetings?

A. Usually at The Bourse.

Q. Did it hold meetings occasionally at other places?

A. Not to my knowledge.

Q. Were you ever at any meetings at A. B. Cunningham & Company?

A. No, sir.

Q. Did you say that there was never at any of those meetings of the executive committee, or before the meeting went into session, or immediately—

A. I felt it was my duty to attend the executive committee meetings.

Q. You do not understand my question. I had not finished the question. Was there any occasion during the meetings of the executive committee or immediately prior to the meeting or immediately after the meeting, when there were present representatives of any tobacco manufacturing companies?

A. Not to my knowledge.

Cross-examination by Mr. CALDWELL:

Q. Mr. Narrigan, you said something about talking with Mr. Omara about a change in discount in reference to the Beechnut cigarette. That was merely a reduction in price that was open to everybody?

A. That was open to everybody. That is why I gave it to the secretary to announce it. It was for the trade and that was the understanding.

Q. And that allowance of 35¢ per thousand was open to everybody?

A. Yes, sir; that was a trade concession given to everybody.

327 Cross-examination by Mr. WALSH:

Q. After the adoption of the 8% maximum, did you give 8% to all your customers or was there a sliding scale?

A. It was our intention to give it to all. If it didn't reach all, it was an accident. Our object was to try to do so; to treat them all alike.

Q. Did you give 8% to the small dealers and large dealers just the same?

A. Well, as distributors our object is to place the merchandise in the hands of all the dealers and I feel they are all entitled to the same price, irrespective of quantity. That is the manner in which we conduct our business.

Redirect examination by Mr. SMITH:

Q. Mr. Narrigan, I show you this notice which has been marked "Commission's Exhibit No. 12" for identification. Did you ever see that notice before or a similar notice?

A. A notice similar to that.

Q. Where did you see it?

A. It came through the mail.

Q. Who sent it out?

A. It would naturally be sent out by P. Lorillard Company.

Q. You think that is a circular of P. Lorillard Company rather than from the association?

A. Well, the wording of that is similar to what is on the circular.

Q. What circular?

A. The Lorillard circular.

288 Mr. CALDWELL. I object to this witness testifying what he thinks it is. There are no names written above the type-written notice; it is simply something written on this piece of paper.

The WITNESS. I will tell you what I believe it is.

By Mr. SMITH:

Q. Will you tell us, Mr. Narrigan, what that paper is?

Mr. CALDWELL. I object to it because the paper is the best evidence as to what it is and speaks for itself.

Mr. SMITH. The paper is the best evidence of its contents, of course.

The EXAMINER. Objection overruled.

(Exception.)

A. This is a similar notice to the notice that would be sent out from time to time to members of the association of any discontinuance of a deal so that all can conduct their business on the same lines.

Q. Did you receive notices of this kind, or a copy of this notice?

A. I must say that I did from the fact that I was a member of the association.

Q. Did the association send out notices of changes in discounts and changes in prices and changes in deals to its members?

289 Mr. CALDWELL. Objected to unless this witness knows of his own knowledge.

(Objection overruled.)

(Exception.)

A. To the best of my knowledge it did.

Q. And you think, and your best belief is, this paper is what?

A. This is a copy of one of those notices sent out by the association.

Mr. SMITH. Mr. Examiner, I offer this paper, which has been marked "Commission's Exhibit No. 12 for Identification," in evidence, and ask that it be marked "Commission's Exhibit No. 12."

Mr. CALDWELL. I object to it as not having been properly proven.

The EXAMINER. Objection overruled. The exhibit will be admitted and marked "Exhibit No. 12."

(Exception.)

Cross-examination by Mr. CALDWELL.

Q. This Exhibit No. 12, which you have been examined about, reads as follows:

" NOTICE

" The 35¢ per M allowance on Turkish cigarettes discontinued at close of business June 25th."

A. Yes, sir.

Q. What year is referred to, if you know?

A. 1921.

530 Q. 1921?

A. Yes, sir.

Q. What I have read is the exact wording of the notice according to this Exhibit 12?

A. Yes, sir.

Q. This 35¢ per M (which means a thousand) allowance on Turkish cigarettes was something that was discontinued by the manufacturer?

A. Yes, sir; by the manufacturer of Turkish cigarettes.

Q. It was not something that was discontinued by the association, was it?

A. Discontinued from the factory—by the manufacturer.

Q. And it was something that applied not only to the members of the association but applied to all of the jobbers in Philadelphia, did it not?

A. Yes, sir; and we got other notices.

Q. And you as a jobber in Philadelphia, at the time of the discontinuance of this 35¢ allowance, received a similar notice to this one from the manufacturer, whoever he was, in reference to the discontinuance of this 35¢ allowance?

A. A circular similar to that as far as expression goes; the reason I am answering you that was is because you have a piece of paper pasted to that notice, which would not be attached to the notice the factory send out. We would simply get an ordinary, regular sheet of paper with the notice typewritten on it.

Q. You mean you usually got it on the letterhead of the manufacturer who discontinued the deal?

A. Yes, sir; that is right.

531 Cross-examination by Mr. WALSH:

Q. Does this notice which is contained in Exhibit No. 12 (commission's Exhibit 12) indicate or convey any notice that the association allowed a 35¢ per thousand allowance on Turkish cigarettes?

MR. SMITH. I object to that, as the paper speaks for itself.

THE EXAMINER. I sustain the objection. He said "this paper" and the paper speaks for itself.

Q. I will ask you if this notice is a notice of the discontinuance of any 35¢ per thousand allowance on the part of any members of the association?

A. On the part of any members?

Q. Yes.

A. You mean a voluntary contribution from the members of the association? A. Oh, no.

Q. Did this notice give notice of any agreement on the part of the association as to any 35¢ allowance?

(Objected to.)

(Objection sustained.)

THE WITNESS. I thought I explained that in my first answer. I said it was a similar notice to the notice I received from the manufacturer.

Q. Did the members at any time, who constituted the 532 association, agree to a discontinuance of the 35¢ allowance per thousand?

A. Did they agree?

Q. Yes.

A. It wasn't for them to agree. In the first place they never contributed the 35¢ per thousand.

Cross-examination by Mr. TAULANE:

Q. Was the discontinuance of the allowance in this notice the result of any action on the part of the association?

A. No, sir.

Q. Is not this notice which was sent out simply in confirmation of some action taken by the manufacturers regulating the price?

A. Yes, sir.

Redirect examination by Mr. SMITH:

Q. Is it not a fact that the manufacturer in this case furnished the association, through you, with the information contained in this notice so that the members of the association could have the notice before a general notice could go out to the trade?

A. Oh, no.

Q. Is this notice, commission's Exhibit No. 12, the one you had in mind when you said a representative of the Lorillard Company wanted to know why their goods were not being marketed and you told him his price was higher than similar brands?

A. No. That conversation refers to the Beechnut cigarette and this refers to "Turkish cigarettes."

Q. Is this the notice you had in mind when you said a representative of one of the manufacturing companies asked you if a
533 better discount were given by his company, the information would be given through this association to the trade?

A. Well, I can't answer that question in the manner in which you ask it.

Q. Well, will you answer it your own way?

A. The question was raised between Mr. Omara and myself as to the possibility of bettering the sale of Beechnut cigarettes and I said they made it difficult to handle and he said why and I said we are selling our goods on 8% and you have requested us to allow the trade only 5% and in order to goods of similar manufacture it is always necessary to meet the conditions. If the manufacturer wants his goods marketed they must be very nearly the same price as similar goods in the market.

Q. Then what did he say?

A. He raised the question if they allowed the trade to make a similar price on his merchandise did I think it would help their goods any and I said I thought it would help and then he wanted to know the best means of reaching the trade.

Q. What did you tell him?

A. I told him I didn't think there was any question about reaching the trade promptly, I said, so that the trade could be reached the following day.

Q. How did you tell him that action could be so prompt?

A. I knew just the conditions. Mr. Eberbach was out of town. It wasn't a question of calling up anybody but Mr. Brogan, who was the secretary of the association.

Q. Did you tell this representative of the Lorillard Com-
534 pany that that was the means you could get the notices to the trade promptly by?

A. I don't recollect.

Q. Did you so tell him?

A. He left it to me entirely, but I knew what I had in my mind to do.

Q. Was that better discount that you and Mr. Omara spoke of allowed by the Lorillard Company on that brand?

Mr. CALDWELL. That is objected to as irrelevant, immaterial, and incompetent and having nothing to do with the issues in this case. It has been testified to as a pure matter of reaching the trade of selling goods at the same price as the competitors were selling; it was a means of getting the goods marketed in general and it has nothing to do with the issues in this case.

(Objection overruled.)

Mr. TAULANE. I object to it on behalf of the other respondents because it has nothing to do with this case.

(Objection overruled.)

Exceptions allowed.)

A. These goods were shipped to us at a price—I will have to tell you the whole story.

Mr. CALDWELL. I object to this as incompetent and irrelevant and immaterial and as having nothing to do with the issues of this case. There is nothing tending to show that Mr. Omara had
535 any authority to bind the company in any way, shape or form. (Objection overruled.)

(Exception.)

The WITNESS. The goods were shipped to us at a certain price and at a given time; there was an allowance of 5%. The goods were billed to us at 10 and 2. We were requested to give "less 5%" to the trade.

Q. Who do you mean by "we"?

A. The jobber individually. Now, then, all the other goods manufactured by other manufacturers were placed on the market without any request being made for any effort or any price—goods of a similar nature. When the question comes up as to what is the best way to feature a brand, the answer is the best way to feature a brand is to make the price the same as on the same grade and that was my answer to Mr. Omara and in response to that he said they would be willing to let the trade act as they chose in the matter.

Mr. CALDWELL. I move to strike out this testimony as irrelevant, immaterial, and incompetent and not relating to the issues in this case.

(Objection overruled.)

(Exception.)

Q. And Mr. Omara agreed to meet the suggestion made by you?

A. Yes, sir.

536 Q. Did you tell him that you would immediately notify the trade?

A. I said I would take it upon myself to notify the trade.

Q. Did you notify the trade?

A. I took means to notify the trade.

Q. When?

A. Immediately after he left the store.

Q. What means did you take?

A. I told the secretary of our association.

Q. Whom do you mean when you speak of the "trade"?

A. Tobacco trade.

Q. Members of the Wholesale Tobacco Jobbers Association?

A. Members of the Wholesale Tobacco Jobbers Association and others.

Q. Who did you notify besides members of your association?

A. Well, such a house as Frings Brothers.

Q. And Seider's?

A. Yes; I don't think there was any doubt about them.

Q. Those were the only two firms in Philadelphia who were not members of your association, that is, direct buyers from the American Tobacco Company, Liggett & Myers, Lorillard Company?

A. The only two, there is a question there, Mr. Smith, if you will let me state it.

Mr. CALDWELL. I object to any volunteer statements on the part of this witness.

Q. Is there any explanation you want to make to anything you have testified to?

A. Yes.

537 Q. Will you make that explanation?

A. You asked me whether we notified Seider. Now the reason why we would notify him or take the same method in his case was because he had made application to become a member of the association because he called on me personally.

Q. And applied for membership in the association?

A. Yes, sir; and I turned the matter over to Mr. Eberbach and we took means to notify Frings Sons by phone.

Q. Do you know the means that were taken to notify the members of the trade of this change?

Mr. CALDWELL. Same objection as before on behalf of the Lord-lard Company.

(Objection overruled.

Exception.).

Q. What instructions did you give Mr. Brogan?

A. I requested Mr. Brogan to notify the trade. What means he adopted I don't know.

Q. Do you know whether Mr. Omara knew you were vice president of the association?

Mr. CALDWELL. That is objected to as calling for a conclusion as to his knowledge. He can't state what was in the mind of any other witness.

The EXAMINER. Objection overruled. Answer the question, Mr. Witness.

538 A. There is no reason why I should have that knowledge.

Q. Did you ever tell Mr. Omara you were vice president of the association?

A. Not to my knowledge.

Q. Did Mr. Omara ask you?

A. I have no recollection of his asking that.

Q. Did he ask you how you would notify the trade?

A. He asked me if I had means of notifying them.

Q. And you told him "Yes"?

A. Yes.

Q. Did you tell him Mr. Brogan would send out the notices?

A. I didn't mention Mr. Brogan.

Cross-examination by Mr. CALDWELL:

Q. This notice that has been put in evidence here and which we have been wrangling about so long, commission's Exhibit No. 12, had nothing to do with this notification you now talk about on Beechnut cigarettes?

A. I think I have answered that twice already.

Q. Would you mind answering it the third time?

A. Certainly. It has nothing at all to do with it.

Q. In your individual capacity, from time to time, didn't you acquaint your customers with the change that was made by the manufacturers from time to time with reference to the price of their goods?

A. Did we what?

Q. Didn't you, individually, and your firm, without regard to the associations in any way, shape, or form, acquaint your customers from time to time of change in prices by the manufacturer?

A. We certainly did.

Q. And you now say that this change of 35c per thousand on Turkish cigarettes may have been communicated to your customers in your individual capacity?

A. By our salesmen.

Cross-examination by Mr. WALSH:

Q. On the Beechnut cigarettes the only discount you were getting was 5 and 2?

A. No, sir; 10 and 2.

By Mr. CALDWELL:

Q. The manufacturer of the Beechnut cigarettes did not attempt to control any price you were selling the Beechnut cigarette at after you purchased them?

A. No.

Q. You could sell them at any price, or give them away if you saw fit, could you not?

A. Yes; we could do so if we chose.

By Mr. WALSH:

Q. The association had nothing to do with the price the Lorillard Company fixed on the Beechnut cigarettes in any way?

A. No, sir.

Redirect examination by Mr. SMITH:

Q. Mr. Narrigan, what did you mean by your answer to the question asked you by Mr. Caldwell of the Lorillard Company when he asked you whether you could sell any of your tobacco products at any price you pleased?

A. Well, that has been the spirit of the trade ever since I have been in it.

Q. There is no law to stop you?

A. No, sir; just a matter of common sense.

Q. But the rules fixed by the association had some change on that policy—that is, the resolutions had?

A. Quite naturally; yes, sir.

Q. Do you know whether the Lorillard Company was behind the association?

A. Behind it?

Q. Or in favor of it?

(Objected to.)

The WITNESS. I think if the members of the association are here, and a few of them are, they will recollect my views on that subject. That I questioned at any time the real intent to be back of the association or anything that pertains to a better price than what we were getting.

Q. What the jobbers were getting?

A. Yes, sir. I don't think any of them are concerned outside of our ability to pay our bills.

By Mr. TAULANE:

Q. Mr. Narrigan, you were subpoenaed to come here by the Federal Trade Commission?

A. Yes, sir.

541 Mr. SMITH. Mr. Examiner, I think if we called another witness this afternoon we would not finish with him. Mr. Caldwell wants to be in New York tomorrow, and Mr. Walsh wants to be in Washington tomorrow, and under the circumstances I ask for an adjournment until Thursday of next week, October 26, 1922, at 10 o'clock a. m. at this place. I request also, Mr. Examiner, that you announce to these witnesses who are here that they will be required to be here next Thursday at 10 o'clock a. m.

The EXAMINER. Mr. Walsh, Mr. Caldwell, and Mr. Taulane, do you gentlemen—

(Mr. Walsh, Mr. Caldwell, and Mr. Taulane stated they desired the proposed continuance.)

The EXAMINER. Let that be the order; this case will be adjourned to Thursday of next week, October 26th, 1922, 10 a. m. at this place, Federal Building, Philadelphia, Pa.

(Adjourned to Thursday, October 26, 1922, 10 a. m.)

542 BEFORE THE FEDERAL TRADE COMMISSION

FEDERAL TRADE COMMISSION

VS.

WHOLESALE TOBACCO AND CIGAR DEALERS ASSOCIATION of Philadelphia et al.

Docket No. 886.

PHILADELPHIA, October 26th, 1922—10 a. m.

Before George McCorkle, Examiner.

Appearances: Edward L. Smith and Edwin B. Haas for the commission; John Walsh, L. A. Speiss, Junius Parker for the American Tobacco Company, of respondents; Charles Caldwell (Woolworth Bldg., New York) for P. Lorillard & Company, of respondents; Joseph H. Taulane (Stephen Girard Bldg., Phila., Pa.) for other respondents.

PROCEEDINGS

Examiner McCORKLE. Are you ready, gentlemen?

Mr. SMITH. Yes, sir; we are ready to proceed, if your honor please.

543 CHARLES SEIDER was thereupon called as a witness and having been duly sworn testified as follows:

Direct examination by Mr. SMITH:

Q. State your name, please.

A. Charles Seider.

Q. Where do you live Mr. Seider?

A. 3000 Girard Avenue.

Q. Philadelphia?

A. Yes, sir.

Q. What is your business?

A. Cigar manufacturer and jobbing in tobacco and cigarettes.

Q. How long have you been in business?

A. Since '74.

Q. In Philadelphia?

A. Yes, sir.

Q. Where is your place of business?

A. Southeast corner, Fourth and Race Streets.

Q. How long has that been your place of business?

A. Since '77, '78; I haven't got the date.

Q. Do you buy directly from the tobacco manufacturers?

A. Yes, sir.

Q. Who are the tobacco manufacturers that you buy direct from?

A. Why, from the American Tobacco Company, the Lorillard Company, Reynolds—in fact we buy from pretty near all the large ones; I cannot just recall the names.

Q. How long have you been buying from the large manufacturers direct?

A. Since I have been in existence in business prior to their combining. I bought their merchandise before they were in combined form.

Mr. CALDWELL. I object and move that the answer be stricken out.

Mr. WALSH. I also object to the answer and ask that it be stricken out so far as it relates to "combined form."

The EXAMINER. Let that part of the answer be stricken out.

By Mr. SMITH:

Q. Who were the other large manufacturers?

A. I can't recall the names.

Q. Since what date have you been buying from the large manufacturers?

A. Since '76, '77.

Q. You have been buying from the American Tobacco Company and the Lorillard Company since that time?

A. Well, the American Tobacco Company—of course I cannot tell you when the association was named the American Tobacco Company, but I bought from the old firm when they first formed the Five Cigarette Company.

Q. You have been buying from the American Tobacco Company for the past five or six years and the Lorillard Tobacco Company?

A. Yes, sir.

Q. Did you know that there was an association of tobacco jobbers in Philadelphia?

A. I heard so.

Q. Were you a member of it?

A. No, sir.

545 Q. By the way, is your business conducted in your own name?

A. Yes, sir.

Q. You didn't join this association?

A. No, sir.

Q. Were you ever requested to join it?

A. I was never requested to join direct.

Q. Have you ever talked with any representative of the American Tobacco Company about that association?

A. Yes, sir.

Q. When?

A. That was the beginning of 1921—the beginning of the year 1921.

Q. Do you remember the name of the representative of the American Tobacco Company to whom you talked about this jobbers' association?

A. I don't remember his name.

Q. Tell us what he said to you.

Mr. WALSH. I object. We have no identification of this person.

The EXAMINER. Does the witness know that he was the representative of the American Company?

Mr. SMITH. He says he was a representative of the American Company and that he has been buying their products since 1877.

Mr. WALSH. We have a right to have the name of this alleged representative.

By Mr. SMITH:

Q. Do you know this man was the representative of the American Tobacco Company?

A. Yes, sir.

546 Q. How do you know that he was their representative?

A. By him representing himself as such and giving me his card, and taking orders.

Q. Has he taken orders from you before this interview that you speak of?

A. Yes, sir.

Q. Has he taken orders from you for the American Tobacco Company since that occasion?

A. Now, I can't recall that.

By the EXAMINER:

Q. Were these orders filled?

A. Yes, sir, prior to our conversation.

Mr. WALSH. I object, because in the first place it does not appear that this person was actually representing the American Tobacco Company, and in the second place there is nothing to indicate that any conversation was had with such a person alleged by the witness to be the representative of that company, or that the conversation or talk was within the scope of the authority of such alleged representative.

Mr. CALDWELL. I also object on the same grounds, and as not binding upon the Lorillard Company.

The EXAMINER. I will hear the testimony.

By Mr. SMITH:

Q. What did you say?

A. I says, "I haven't been asked to join it."

547 Q. You said you hadn't been asked to join it?

A. I says, "I haven't been asked to join it by the Philadelphia jobbers."

Q. Was there anything further said in that conversation with him?

A. "Why," he says, "it will be better for you if you do."

Q. What else did he say besides that it would be better for you if you did join the association?

Mr. WALSH. I object.

(Objection overruled.

Exception.)

By Mr. SMITH:

Q. You may answer.

A. We had a lengthy talk. I can't recall all that he did say.

Q. Will you tell us all of it that you do recall?

A. I shall try. We talked—he says, "It will be better for you; you might get your goods if you make more disturbance." I can't—of course, we had a talk together with reference to the prices, buying and sellings prices. I says, "I have never bothered jobbers before with respect to prices; I don't see why I should interfere with any of their prices, or why they should interfere with my prices." We talked maybe for half an hour—I can't recall the rest of the conversation to be of any advantage for this meeting.

Q. You said, "We talked with reference to prices." Will 548 you tell us what he said with reference to prices?

A. As regards the discounts.

Q. Tell us what he said, Mr. Seider; it is not clear to us.

A. He gave me no positive figures, but his meaning was to go along with the rest of the jobbers.

Mr. WALSH. I move that the answer be stricken out.

By Mr. SMITH:

Q. What did he say?

A. I can't recall any further conversation we had, any more than talking about orders.

Q. What talk did you have about orders?

A. He said any orders given would be prompt—shipped prompt.

Q. Any orders given the American Tobacco Company were shipped promptly?

A. Yes, sir. This was in the month of January when we were talking.

Q. What year?

A. 1921.

By the EXAMINER:

Q. Was this when you had the interview with the representative of the American Tobacco Company?

A. Yes, sir.

By Mr. SMITH:

Q. Did you state whether you stated to this representative
549 of the American Tobacco Company that you would join the association?

A. I did make a remark in the way—I says, "I have no objection to join the association."

Q. Did you join?

A. I didn't join.

Q. Did anybody else?

A. I have never been asked to join it except during the month of January, when I received a postal card, which was brought home to me, stating that it was an invitation for me to a meeting of the jobbers' association.

Q. Where is that postal card?

A. I was looking for it—it is somewhere, but it was an invitation to a meeting.

Q. You say you got that postal card in January?

A. Yes; during the time that I was sick. I was under the weather—I wasn't very well. My son brought it home.

Q. How close was the receipt of this postal card to the interview you had with the representative of the American Tobacco Company that you have spoken of?

A. It was within possibly two weeks.

Q. Prior to that interview or later?

A. I think the postal card was prior.

Q. Did you accept the invitation to attend the association of jobbers extended to you in that postal card?

A. Did I accept it?

Q. Yes; the invitation to attend the meeting of the jobbers' association.

A. No; I didn't accept it, because I could not go very well—I didn't feel very well.

Q. After this interview that you speak of with the representative of the American Tobacco Company, at your business office in the early part of 1921, how were the orders which you gave the American Tobacco Company filled?

A. All right.

Q. Were these orders accepted?

A. Yes, sir.

Q. Did you have any difficulty in getting your goods from the American Tobacco Company after that time?

A. Yes; a little later on.

Q. When?

A. I haven't got the exact date.

Q. When did that difficulty commence?

A. I don't exactly—

Q. As near as you can tell.

A. I suppose about two months later.

Q. What happened with respect to the shipment of your goods to your orders given to the American Tobacco Company two months later?

A. What happened?

Q. Yes.

A. I simply didn't get them; didn't receive any goods.

Q. Did you put in any orders to the American Tobacco Company for goods?

A. Yes.

Q. Were these orders filled?

A. Not at the time when we sent the orders.

Q. How long a period was it that your orders were not filled by the American Tobacco Company?

A. About two months.

Q. Up to the time you had this interview with the representative of the American Tobacco Company at your place of business, in the early part of 1921, had your orders to the Lorillard Company been promptly filled?

A. Up to that time they were.

Q. After this interview, Mr. Seider, what do you say as to the acceptance of your orders by the Lorillard Tobacco Company?

351 Mr. CALDWELL. I object to the form of the question.

(Objection sustained.)

By Mr. SMITH:

Q. Did you ever have any difficulty in having your orders accepted by the Lorillard Tobacco Company?

A. Yes, sir.

Q. When?

A. I can't say the exact date. It was started possibly in March or April.

Q. 1921?

A. Yes.

Q. How long did that continue?

A. About—nearly six months.

Q. During that period did you try to buy from the Lorillard Company?

A. Yes, sir.

Q. During the period that your orders were not accepted by the Lorillard Company, were you trying to buy goods from the American Tobacco Company?

A. I did buy.

Q. During the period, I think you have said about two months, that you were not receiving goods from the American Tobacco Company, were you trying to buy from the Lorillard Company?

A. I was buying.

Q. I think you said that a period of two months.

A. That was a little later.

Q. I am speaking now with respect to the period when you didn't get goods from the American Tobacco Company. During that period that you didn't get goods from the American Tobacco Company, were you trying to get goods from the Lorillard Company?

A. We sent orders away.

532 Q. What happened to those orders?

A. They were not filled.

Q. Why were you trying to get the Lorillard Company's goods?

A. We had sales for them.

Q. Why were you trying to get the American Tobacco Company's goods?

A. The same thing.

Cross-examination by Mr. WALSH:

Q. Mr. Seider, you say that this interview with the representative of the American Tobacco Company took place in January, 1921?

A. Yes, sir.

Q. At your business office?

A. Yes, sir.

Q. What was this man's name?

A. Why, he said to me—

Q. I am not asking you that, Mr. Seider; I am asking you what his name is?

A. I can't tell you; I don't remember. I have heard his name, but I can't recall it.

Q. Do you know you were giving testimony here about this interview with a certain man?

A. Speaking about it, yes.

Q. That you were repeating a conversation you had with a certain man; is that right?

A. How do you mean?

Q. You know you were repeating a conversation you had with a certain man?

A. Conversation with a certain man?

Q. Yes.

A. What do you mean repeating it.

Q. You were repeating a conversation you had with a certain man?

A. Yes; that is the best I can do I can't tell you his name;

553 I don't remember it. Maybe my son does; I don't.

Q. Was your son present when this conversation was had?

A. Yes; he was in the place of business.

Q. You don't know whether he was present and heard it or not?

A. He was there attending to his business.

Q. Just answer my question: Do you know whether your son was present and heard this conversation?

A. Yes, sir; from time to time he stopped to talk.

Q. Did this man ever sell goods to you, this man whom you say was the representative of the American Tobacco Company?

A. He never sold goods to me; he took orders.

Q. He took orders?

A. Yes, sir.

Q. You don't recall his name?

A. I do not.

Q. Did you regard this conversation as an important conversation?

A. Important?

Q. Yes.

A. Well, I don't know; I can't say that.

Q. You can not say that it was an important conversation you had with this man?

A. No, sir.

Q. It didn't occur to you at the time that it was an important conversation?

A. Well, the only thing that was important to me was when he told me, asked me with reference to the jobbers' association.

Q. Why not belong to it?

A. Yes.

Q. What did this man look like?

A. Well, I don't just—

554 Q. We want to see if we can't locate this fellow—what does he look like?

A. As far as I can remember he was about five feet ten inches tall, dark complected, possibly weighing 160 pounds, about my build, only a little taller.

Q. About what age was he, would you say?

A. I would judge, possibly about forty or forty-five.

Q. Had he been taking orders from you for any length of time?

A. He has come occasionally.

Q. What was the object of his visit at this time you speak of?

A. To see if I wanted any goods.

Q. To see whether you would need any goods?

A. Yes.

Q. What was the situation with reference to that?

A. Why, he would accept orders.

Q. He would accept orders. And he took orders at that time?

A. Yes.

Q. Was there or wasn't there any talk at that time as to what you were selling your goods for?

A. No; we hadn't any talk about that. I never bothered about that part of it. That didn't come up.

Q. There wasn't any question opened as to what you sold your goods for at that time at all?

A. No. If there was such a question, I always kept it to myself.

Q. You didn't discuss that at all?

A. No.

Q. He didn't discuss the question with you as to what you were selling the American Tobacco Company's goods for?

A. No; we never had any conversation on that. If it was mentioned, it was shoved aside, because I never allow it in my business.

Q. He didn't object to any price at which you were selling your goods?

A. No; the prices didn't make any difference.

Q. To him?

A. No.

Q. How did you come to talk about this association to this man?

A. Because he asked me then whether I had joined the association yet.

Q. You said, "No"?

A. I said I didn't belong to it; I said I haven't belonged to it.

Q. That conversation was held last January?

A. Some time in the latter part of January.

Q. That is a long while ago?

A. Yes.

Q. You are not sure as to all that was said?

A. Well, there might have been a little more said, nothing interesting.

Q. And you are really not sure as to what he actually did say relative to this association, Mr. Seider?

A. I told you what he said. He asked me a question about whether I had joined the association. That is about what he said, and he did make the remark, "You had better join it." I says, "I might fall in if everything would be satisfactory."

Q. That was how the matter of this association came up?

A. That's the way.

Q. There wasn't anything said that you interpreted as a refusal to give you goods, because you didn't join the association?

A. There was nothing said at that time; no, sir; that I can remember.

556 Q. You didn't understand from him at that time that if you didn't join the association, you would not get goods, did you?

A. No.

Q. That wasn't the understanding, was it?

A. Not between us; no, sir.

Q. Then this was a general discussion as to the conditions of the trade in Philadelphia?

A. Yes; we generally talked about these things, more so that time than any other.

Q. When the representative of the American Tobacco Company would come there to your place of business, you generally talked about conditions in the trade in Philadelphia?

A. Yes.

Q. You say that afterwards there was a period when you did not get goods from the American Tobacco Company.

A. Yes.

Q. When was that?

A. I haven't got the dates here, but I should judge about April.

Q. April, 1921?

A. Yes, sir.

Q. How long was that period?

A. About two months.

Q. That you hadn't been getting any goods?

A. Hadn't got any.

Q. Did you have communication with the American Tobacco Company about that?

A. I can't recall that we had, outside of asking why our goods were not shipped.

Q. Yes.

A. On the strength of that, I think we sent a couple of letters in regard to it.

Q. You haven't these letters or copies of them?

A. I have not, not with me; no, sir.

557

Continued cross-examination by Mr. CALDWELL:

Q. Mr. Seider, you say your place of business is at Fourth & Race Streets, Philadelphia.

A. Yes, sir.

Q. What kind of business do you conduct there?

A. Wholesale and retail. We sell and manufacture cigars, cigarettes, tobacco, and pipes.

Q. About what is the size of your place of business there?

A. What do you mean?

Q. How many feet frontage have you?

A. Just about 200.

Q. How deep?

A. About 50 feet.

Q. How large a part of it is devoted to retail trade?

A. About one-third of the first floor—no, about one-half.

Q. How many floors have you there?

A. Four floors.

Q. Do you use these four floors to conduct your business?

A. Yes.

Q. Do you conduct any other business except the tobacco business?

A. No, sir.

Q. You were purchasing tobacco from the Lorillard Tobacco Co. in 1917, were you not?

A. We bought from them—

Q. In the year 1917, your firm purchased from the Lorillard Tobacco Company?

A. Yes.

Q. Who comprises your firm?

A. Charles Seider.

Q. What is the title of the firm?

A. Charles Seider.

Q. Your son is not a member of the firm then?

A. Not yet.

558 Q. He has been up to the present?

A. Not by name—his name does not appear.

Q. Is he interested as a partner in any way?

A. Why, he is; yes, sir.

Q. Do you recall the total volume, or substantially the total volume of your purchases from the Lorillard tobacco in 1917?

A. I could not tell you that.

Q. If I were to suggest to you that the total purchases of your firm from the Lorillard Tobacco Company in 1917 were \$2,176.74, would you think that would be about right?

A. I could not tell you. I can't tell; I have no idea of the figures.

Q. Don't you recall whether you were purchasing from the Lorillard Tobacco Company about \$2,000 worth of goods in the year 1917?

A. I could not answer that; I could not tell you unless I went over my books.

Q. From your general knowledge of your business, would you say that was about right, would you not?

A. I would think it was more.

Q. How much more?

A. I can not tell further than that. There were one or two years that we done it under a certain loss.

Q. Take the year 1918, would you say you did about \$2,000 worth of business, made that amount of purchases from the Lorillard Tobacco Company?

A. I can't answer that.

Q. Would that be about right?

A. I would not say.

Q. Sir?

A. I would not think so.

559 Q. What would you think?

A. Well, now, that is a hard thing to tell. I can't tell that exactly unless I look over my books.

Q. Will you look over your books for the years 1917, 1918, 1919, and 1920, and let us have the figures, if you come back here after lunch?

A. Well, I will see what I can do.

Mr. WALSH. I wish to make the same request on behalf of the American Tobacco Company.

By Mr. CALDWELL:

Q. Mr. Seider, would you say that your orders to the Lorillard Tobacco Company for the year 1919 amounted to \$2,097.18?

A. I cannot tell you that; I cannot answer that, because I haven't got those figures in my head.

Q. Would it be your best recollection that your purchases amounted to about that figure?

A. No, I would say they were more than that, but I would not be sure. I cannot say that.

Q. I ask you if it is your best recollection that your total purchases from the Lorillard Tobacco Company in the year 1920 amounted to \$2,867.90?

A. What year was that, did you say?

Q. 1920.

A. I could not answer that.

Q. That would be about the volume of business done that year, would it not?

A. I would think it was more than that. Of course, I may be wrong.

Q. Well, now, thinking the matter over, were not your purchases and orders in the years 1917, 1918, and 1919, just around 360 \$2,000 a year?

A. I can't answer that. I think they were more.

Q. You would not think they ran as much as \$2,500?

A. Yes; I would.

Q. A year?

A. Oh, yes, I would.

Q. Your recollection is not very good then, is it?

A. Well, I don't carry these figures in my head.

Q. You will be able to look over your books and see if these figures are accurate, substantially correct, will you not? You will do that, will you not?

A. Yes.

Q. Will you be surprised to learn if the figures I have given you are the correct figures?

A. Possibly it may be so; I can't tell that.

Q. I would ask you whether or not it is your recollection that in the single month of January in the year 1921, your purchases from the Lorillard Tobacco Company amounted to \$2,149.56? Is it your recollection that your orders amounted to that sum, or about that, in the single month of January, 1921?

A. It might be possible.

Q. Is it your best recollection that is about right?

A. Well, I said I haven't got the figures here.

Q. We are talking about your best recollection of these figures.

A. I think it is very close, very likely.

Q. So that in the single month of January, 1921, you ordered more goods from the Lorillard Tobacco Company than you ordered in the entire year of 1918, didn't you?

A. I can't tell you that unless I look it up.

561 Q. And in the single month of January, 1921, you ordered from the Lorillard Tobacco Company more goods than you had ordered during the entire year of 1919; didn't you?

A. I can't tell you; I can't answer that.

Q. I will ask you if it is your best recollection whether or not the amount of your orders to the Lorillard Tobacco Company in the month of February, 1921, amounted to \$2,135.35? Is that about it?

A. It might be right.

Q. Your recollection is that these figures are right?

A. I know our tobacco business increased.

Q. I will take the month of March, 1921, and ask you whether or not your purchases from the Lorillard Tobacco Company in the month of March, 1921, didn't amount to \$2,387.93? Would that be about right according to your recollection?

A. I can't exactly say, but as I have said, our tobacco business increased.

Q. To your best recollection that is about right.

A. It might be.

Q. I will ask you if it is your best recollection that in the month of April, 1921, your purchases from the Lorillard Tobacco Company amounted to \$2,629.93?

A. That was the month of April, 1921.

Q. Yes.

A. Possibly it might be right.

Q. Now, isn't it the fact that in the early part of January, 1921, your orders to the Lorillard Tobacco Company increased by leaps and jumps over what they had been in previous years?

A. Yes, sir; I know they increased.

562 Q. Is it your best recollection that in the four months of January, February, March, and April, 1921, you ordered \$9,302.77 worth of goods, whereas in the entire years of 1917, 1918, 1919, and 1920 you ordered \$9,230.04 worth of goods, would that be about right?

A. I can't tell you, of course, but if you have got the figures, it might be right.

Q. Isn't it the fact that in the first four months of 1921, you ordered from the Lorillard Tobacco Company as many goods as you ordered during the entire four preceding years?

A. Possibly; I can't say exactly.

Q. That is about right according to your best recollection?

A. Yes.

Q. Now, Mr. Seider, at what prices at retail during the months of January, February, and March, 1921, were you selling the products of the Lorillard Tobacco Company?

A. Retail, you mean?

Q. Yes.

A. We got ten-cent packages.

Q. Tobacco and cigarettes?

A. Yes, sir.

Q. Omega, how much?

A. Ten cents a package.

Q. Prince Albert?

A. Ten cents.

Q. Cigarettes—Murad, how much?

A. I guess twenty cents.

Q. Helmar?

A. About fifteen cents.

Q. Mogul?

A. About twenty cents.

Q. Beechnut cigarettes?

A. Cigarettes or tobacco?

Q. Cigarettes.

A. Fifteen cents.

368 Q. Did you sell at retail during January, 1921, the bulk at these prices?

A. Retail? No.

Q. April, 1921?

A. No, sir.

Q. Now, in the four months of 1921—the first four months—you also sold at wholesale these tobacco products of the Lorillard Tobacco Company, did you not?

A. Sold some; yes.

Q. At what prices did you sell these products at wholesale?

A. According to the customer—according to how much he bought.

Q. Can you tell us what the general run was?

A. We were selling from five per cent up to ten per cent.

Q. That means ten per cent off, does it not?

A. Yes.

Q. Wasn't the bulk of it ten per cent off?

A. The bulk?

Q. Wasn't the bulk of the sales ten per cent off during the first four months of 1921?

A. What do you mean, "the bulk"?

Q. The bulk of your business for these Lorillard products, most of them that were sold wholesale were sold at ten per cent off?

A. You mean the names of the goods?

Q. No; I mean the discount you gave to your customers, wholesale.

A. Yes.

Q. The bulk of the business done with the Lorillard Tobacco Company during 1921—the goods were sold wholesale at ten per cent off?

A. From five to ten per cent.

Q. The bulk was sold at ten per cent, wasn't it?

A. Well, possibly.

Q. That is about right, isn't it?

A. Pretty near right.

564 Q. That is right?

A. Yes.

Q. At that time you were buying goods at a discount of ten per cent off and a trading discount of two per cent, were you not?

A. Yes.

Q. Two per cent for cash discount?

A. Yes.

Q. Mr. Seider, have you not been from time to time, especially during the latter part of 1920, and the early part of 1921, averse to making any statement, any financial statement to Bradstreet and Dunn representative?

A. I don't remember that I made any statement to them.

Q. Whenever they asked a financial statement from you, did you as a rule, decline to give them any statement?

A. Yes, sir.

Q. Now, Mr. Seider, your business very freely expanded in the first four months of 1921 over what it had been previous to that time?

A. Why, my son—

Q. Just answer yes or no.

A. It was prior to January, 1921.

Q. In the latter part of 1920 and the first four months of 1921, commencing January, it expanded very freely over what your business was prior to that time, didn't it?

A. Yes, sir.

Further cross-examination by Mr. WALSH:

Q. Mr. Seider, you have testified in response to counsel for the Lorillard Tobacco Company that during this period, in the early part of 1921, you sold the bulk of the Lorillard Tobacco Company's products at those prices less a discount of ten per cent. I take it that the same is true with reference to the products of the American Tobacco Company products.

565

A. Yes, sir.

Q. The same thing applies?

A. Yes, sir.

Q. Your business with the Lorillard Tobacco Company during that period increased in about the same proportion that your business with the American Tobacco Company increased?

A. Yes, sir.

Q. You testified here, Mr. Seider, that there was a period of two months that you didn't get any goods from the American Tobacco Company. I wish you would think that over and say to the examiner whether or not that is correct.

Mr. SMITH. For what length of time did you say, Mr. Walsh?

Mr. WALSH. I said two months.

A. Now, I don't know whether it was a few days less. I haven't the books.

Q. Two months means eight weeks, does it not?

A. Yes; but if I had my books here I could verify it.

Q. You are not in a position to verify it now, are you not?

A. I think my son can.

Q. You are testifying now.

A. The books would show.

Q. Will you say now—I know you haven't the books here—that it was two months or two or three weeks less?

A. I say the same thing—it was about two months. I don't know any dates.

366 Q. When was this two months' period, Mr. Seider?

A. Somewhere in the latter part of March and April.

Q. The latter part of March and April?

A. I am not quite sure of that, not unless I verified it.

Q. March, April, or June—you are really not sure as to the months in which this situation existed?

A. Not exactly; I can't say.

Q. Your principal business is your tobacco business in years gone by?

A. Why, that was my principal business.

Q. You are a cigar manufacturer?

A. Yes.

Q. What help do you have in the manufacture of cigars?

A. Why, 25 hands down to 5 hands; it just depends upon the business.

Q. How long has that existed in that way?

A. I have been moving along that way for quite a few years.

Q. How many cigars do you put out in the year?

A. A million, a million and a half, five hundred thousand.

Q. What else do you sell besides cigars?

A. Tobaccos, cigarettes, pipes, smokers' mixtures in general.

Q. How does your cigarette business compare with your cigar business?

A. I pay more attention to the cigar business?

Q. Do you have a traveling salesman?

A. I did have.

Q. The sale of cigarettes was a side line with you, wasn't it?

A. Not exactly a side line. We sold them to anybody that
567 wanted any. If anybody wanted any, we took the orders.

Q. That is your principal business, pushing your cigar business?

A. Yes, sir.

Recross-examination by Mr. CALDWELL:

Q. One or two more questions: During the years 1917, 1918, and 1919, you usually paid the Lorillard Tobacco Company within ten days after you purchased from them, didn't you?

A. As close as possible.

Q. Yes.

A. Yes; as soon as possible.

Q. But that was what you usually did?

A. Yes, sir.

Q. In the latter part of 1920 and 1921, at times you took twenty-three days, seventeen days, sixteen days, seventeen days, and the last two months seventeen days within which to pay for these purchases, didn't you?

A. That I can't recall; I can't tell you that.

Q. That would be about right?

A. It is possible so.

Q. The terms were ten days cash in 1920 and 1921, the same as in 1917, 1918, and 1919?

A. The terms have been the same with the exception of some periods when we had delivery allowance, maybe five or six days then, and periods that occurred like late delivery for bad facilities.

Mr. CALDWELL. I move that the answer be stricken out as not being responsive.

The EXAMINER. Yes, strike that out.

568 By Mr. CALDWELL:

Q. The delays in the delivery of the goods has got nothing to do with the time upon which the bills were payable, has it?

A. It has not, with the exception that we had a few periods during the war when the freight delivery was not regular. We could not get the goods.

Q. What war do you refer to in 1921. What was the war in 1921?

A. Not any. I was speaking prior to that.

Cross-examination by Mr. TAULANE:

Q. What was your overhead expenses in your business.

A. I haven't got the figures right here.

Q. If you sold your goods in 1921 at ten per cent off in your wholesale trade, that was a loss, wasn't it?

A. Not exactly.

Q. Why?

A. Why should it be? When I get my orders for my goods, I make two per cent cash discount.

Q. Can you run your business at an overhead of two per cent?

A. No; I don't say that I can.

Q. What is it?

A. I can't tell you.

Q. Do you have any extras or don't you?

A. Well, of course, we have these things once in a while, but I can't tell you just now.

Q. You know what your expenses were last year?

A. I say I can't tell you. I have not the books in front of me.

Q. Can't you tell us from your own experience?

A. Well, if you have the volume of business, you can do the business.

569 Q. As a business man all these years in business do you have any notion of what it costs to do business?

A. I can just answer it this way—it is the volume that will do it.

Q. That is the best answer you can give?

A. That is the best answer I can give to that.

Q. Suppose you shipped \$10,000 worth of goods, do you know what it would cost?

A. Why, I can figure it out.

Q. What is it?

A. Do you want me to figure it out for you?

Q. I want you to tell me.

A. What?

Q. If you sold \$100,000 worth of goods, what would it cost to sell them?

A. I can't figure it out in that way. I never did figure it that way.

Q. You don't think your own services are part of your expenses, do you?

A. Sure; I expect a salary out of my business.

Q. You don't know what the cost is?

A. No.

Mr. TAULANE. All right; that is all.

Redirect examination by Mr. SMITH:

Q. When you paid the Lorillard Company fourteen, fifteen, or seventeen days beyond the time—beyond the ten days' time, did you get your two per cent off?

A. Yes, sir.

Q. The delays, of course, might have occurred once in a while through the mail, for a day or two?

A. Yes.

570 Q. Have you always paid the Lorillard Company for what you bought from them?

A. Yes, sir.

Q. Have you always paid the American Tobacco Company for what you bought from them?

A. Yes.

Q. In your cross-examination by Mr. Walsh you said, referring to your interview with the representative of the American Tobacco

Company, at your place of business in 1921, that nothing was said at the time that if you didn't join the jobbers' association you would not get goods. Was there any other time when was anything like that was said to you by the American Tobacco Company, or any of them?

A. No; not to my recollection.

Q. Was anything at all said to you by the representative of the American Tobacco Company at your place of business in 1921 about prices?

A. No.

Mr. WALSH. I object.

Mr. CALDWELL. He has already said there wasn't.

Mr. SMITH. I am trying to find out if anything at all was said about prices.

The WITNESS. We hadn't anything to do with prices.

By Mr. SMITH:

Q. The representatives of the American Tobacco Company 571 said nothing on that occasion about prices. Is that what you say?

A. Yes; nothing about prices.

Q. Was there anything said about discount?

A. No.

Q. Is there any way that you make money in handling the products of the American Tobacco Company or the products of the Lorillard Tobacco Company, or either of them, besides selling their goods—any given percentage on the prices or discount?

A. Do you mean any extra prices?

Q. Are there any extra profits?

Mr. CALDWELL. I object; it is not an issue in this case.

Mr. WALSH. I also object on the same ground.

Mr. CALDWELL. I think the time of this inquiry ought to be limited.

The EXAMINER. We will proceed.

The WITNESS. Not that I know of.

By Mr. SMITH:

Q. Are there any free deals, or any special deals given to you by the tobacco companies?

A. No; not to the jobbers.

Q. Aren't there lots of cases where goods are shipped by the manufacturers to the retailers in which the jobbers get an allowance or percentage?

A. There have been such deals.

Q. Isn't that an additional source of profit to the jobber?

A. A slight profit.

572 Mr. SMITH. I have here in this book [referring to a copy-letter book in hand] a letter, in reference to which I have been speaking to Mr. Walsh. It is a letter of the American Tobacco Company, as follows:

Mr. CALDWELL. Is it to be offered as an exhibit?

Mr. SMITH. Yes.

Mr. WALSH. I want you to identify to whom and the date.

Mr. CALDWELL. Give us the date.

Mr. SMITH. April 20th, 1921, addressed to Mr. J. B. Bevill, and signed H. J. Hagerty. It is among a list of letters which Mr. Walsh agreed with me could be offered without any objection.

Mr. CALDWELL. I object to this letter, and if I may at this time, to any other letters of the American Tobacco Company, as in no-wise effecting the Lorillard Tobacco Company. I intend to object to each letter.

Mr. TAULANE. I make the same objection.

The EXAMINER. Let the objections be noted.

Mr. SMITH. The letter is as follows [reading]:

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COMMISSIONER'S EXHIBIT 24

THE AMERICAN TOBACCO COMPANY,
111 Fifth Avenue, New York City,
April 20th, 1921.

(Filed)

Mr. J. B. BEVILL, *Office*.

DEAR SIR: Please be advised that the following jobber is under the supervision of Mr. G. W. Hill, and all orders, both stock and drop, are referred to Mr. Hill for his inspection:

Charles Seider, Philadelphia, Pa.

Should this account be discontinued for sales reasons, you will be advised in the usual manner, and we will also advise you just as soon as the account is released and orders issued for execution.

Yours truly,

H. J. HAGERTY, *Credit Department*.

M:MHM.

Mr. SMITH. I ask that the above letter be marked "Commission's Exhibit No. 24."

(Marked for the record accordingly.)

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CHARLES SEIDER, Jr., was thereupon called as a witness, and being duly sworn testified as follows:

Direct examination by Mr. SMITH:

Q. Give your name, please.

A. Charles Seider.

Q. Mr. Seider, you are the son of Charles Seider, who has just preceded you on the witness stand, are you not?

A. Yes, sir.

Q. Were you present in the room when he was testifying?

A. Yes, sir.

Q. Did you hear his testimony as to the nature of the business conducted by him?

A. Yes, sir.

Q. I suppose you agree with the description he gave of the business done by your firm?

A. Yes, sir.

Q. Were you present at any interview between your father and a representative of the American Tobacco Company in the early part of 1921, at your office?

A. Yes, sir.

Q. Did you hear what they said?

A. I beg your pardon.

Q. Did you hear what they said?

A. Yes, sir; I did; I did hear it.

Q. Will you tell us what was said by the representative of the American Tobacco Company on that occasion.

Mr. WALSH. I object. There is no identification of this person.

(Question withdrawn.)

575 By Mr. SMITH:

Q. Do you know the name of this man who was there on that occasion?

A. O'Boyle, I believe, is his name.

Q. Do you know what his position was with the American Tobacco Company?

A. Why, I believe he was a sort of district sales manager.

Q. When was this interview that you speak of?

A. It was in the early part of the year 1921.

Q. Had you ever seen Mr. O'Boyle before?

A. I may have, but I don't recall positively.

Q. Do you remember having seen him since?

A. Yes.

Q. Where did you see him again after that.

A. He called again, when he interviewed me personally without my father.

Q. Did he interview you more than once after this occasion? I am speaking of this interview with your father.

A. I only recall twice; the second time was when I was alone.

Q. Did you have any business relations with him?

A. No.

Q. Tell us what was said by Mr. O'Boyle on this occasion in January, 1921, at your place of business, with your father.

Mr. WALSH. I object upon the ground that there is nothing to indicate any conversation was had with Mr. O'Boyle, which was within the scope of his authority as such representative, or
576 that he was the representative of the American Tobacco Company.

Mr. CALDWELL. I also object on the same grounds and as in no sense binding upon the Lorillard Tobacco Company.

(Objection overruled.)

Exception.)

By Mr. SMITH:

Q. You may answer, if you recall the question.

A. So far as I can recall, he spoke about the conditions that were existing at that time and asked whether we would not comply with the prices that were given out by the association.

Q. Did you know these prices that had been adopted by the association?

A. Yes, sir.

Q. Do you know whether Mr. O'Boyle knew them?

A. That I don't know.

Q. Will you continue and tell what else Mr. O'Boyle said?

A. That is all I recall—all of importance at the time.

Q. Did you join the association, or did your father join it?

A. No.

Q. Did Mr. Overbeck, the president of the jobbers' association, ever visit your place of business? When I speak of your place of business I mean your father's place of business.

A. Yes, sir.

Q. When?

A. Why, the date?

Q. Yes.

A. I should judge it was some time in April, prior to April.

Q. April, 1921?

A. Yes.

477 Q. Was he accompanied by anyone?

A. No.

Q. Prior to this occasion when Overbeck visited your store in 1921 had he ever been there before?

A. He made two visits.

Q. Prior to this visit in 1921 had he ever been there before?

A. No.

Q. What did he say on his first visit?

Mr. CALDWELL. I object, as not binding upon the Lorillard Tobacco Company.

The EXAMINER. The witness can state that.

(Objection overruled.

Exception.)

A. He came in to me, and my father was at the time ill. I told him the situation and he told me his reasons for being there, said he belonged to the association and asked if we would join it. I said I had no authority to say so, that my father was home ill, and that I would take the matter up with him.

Q. When he spoke of his reasons for being there, did he say his reason was to ask you to join the association?

A. Well, he asked if we would join it.

Q. You say he spoke of his reasons for coming to see you. What were his reasons as he gave them to you?

A. To ask us to join the association.

Q. Did I understand you to say that Mr. Overbeck called at your office twice after that?

A. Once.

578 Q. When he came the next time was he accompanied by anyone?

A. By Mr. Krull.

Q. What is Mr. Krull's first name?

A. I believe it is Herman Krull.

Q. Did Mr. Krull ever attend at your office before?

A. No.

Q. What did Mr. Krull and Mr. Overbeck, or either of them, say on that occasion of their visit to your office or place of business?

(Objected to.)

Mr. CALDWELL. I object on behalf of the Lorillard Tobacco Company.

(Objection overruled.

Exception.)

By Mr. SMITH:

Q. You may answer the question.

A. I believe, as far as I can recall, they came on that occasion to ask us to join the association.

Q. Did they say anything further? Was anything further said?

A. There was something said, but I don't remember exactly what was said.

Q. What did they say about the association, if anything.

A. I don't recall what they did say.

Q. Do you remember what else was said except to request you to join the association?

A. I can't say—I do recall that they came there for me—at least to have my father join the association.

579 Q. Have you ever told anybody what they did say to you on that occasion?

Mr. CALDWELL. I object, as immaterial and incompetent.

Mr. WALSH. I have the same objection to make.

(Objection sustained. Exception.)

By Mr. SMITH:

Q. Do you remember in September having met Mr. Krull?

A. Yes.

Q. Do you remember having seen a report of his interview with you on that occasion?

A. Yes, sir.

Q. If I showed you a copy of that report do you think it would refresh your recollection of the conversation between you and Mr. Krull and Mr. Overbeck?

Mr. CALDWELL. I object. There is nothing here to show that it is a true copy, assuming that it is a copy of some report.

Mr. SMITH. I don't care what it is, whether it is a truck or a trolley car, if it refreshes his recollection.

Mr. TAULANE. The proper way to put the question is to show the witness the paper and ask him to refresh his recollection of the interview, not to point to any specific fact, as counsel has done.

The EXAMINER. Question disallowed.

580 By Mr. SMITH:

Q. I show you two sheets of paper, typewritten paper, Mr. Seider, and ask you to read it and say whether it refreshes your recollection [handing witness paper].

A. Yes, sir [after reading].

Q. Does it refresh your memory?

A. Yes, sir.

Q. Now, having your recollection refreshed, will you tell us what Mr. Overbeck and Mr. Krull said on this occasion when you had the interview with them at your father's place of business?

A. All I can say is that Mr. Overbeck was the spokesman, and he asked me if I would—

Mr. CALDWELL. I object on behalf of the Lorillard Company on the same ground as heretofore.

A. He asked me if I would go along with the association prices.

Q. What did you tell him?

Mr. CALDWELL. The same objection.

A. I told him I could not see any reason why we would not be members of the association, and if he wanted to take the matter up further that he should see my father personally.

Q. How long have you been associated with your father in this business?

A. I judge sixteen years.

581 Q. Do you buy at present from the American Tobacco Company?

A. Yes, sir.

Q. Do you buy also from the Lorillard Tobacco Company?

A. Yes, sir.

Q. To whom do you resell the products which you buy from these two companies?

A. To the regular cigar stores, hotels and sub-jobbers.

Q. You sell to hotels?

A. Yes, sir.

Q. And to sub-jobbers?

A. Yes, sir.

Q. You sell by retail?

A. Yes.

Mr. WALSH. Mr. Examiner, counsel has shown the witness a paper from which he is asked to refresh his recollection. I now ask that the respondents be given an opportunity to inspect the paper pre-

sent to the witness from which he was asked to refresh his recollection.

Mr. CALDWELL. I join in this request on behalf of the Lorillard Tobacco Company with reference to this paper which was presented to the witness by Mr. Smith.

(Recess until 1.30 o'clock p. m.)

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Docket 886

PHILADELPHIA, *October 26th, 1922.*

Met pursuant to adjournment, 1.30 o'clock p. m.

Before: George McCorkle, Examiner.

Appearances: Edward L. Smith and Edwin B. Haas for the commission; John Walsh, L. A. Speiss, Junius Parker for the American Tobacco Company, of respondents; Charles Caldwell (Woolworth Bldg., New York) for P. Lorillard & Company, of respondents; Joseph H. Taulane (Stephen Girard Bldg., Phila.) for other respondents.

Mr. SMITH. Mr. Examiner, you noted that before the adjournment this morning the gentlemen on the other side asked to see the two sheets of paper which I gave to the witness, by which he said his recollection was refreshed. I now hand these two sheets of paper to these gentlemen [handing papers to Mr. Taulane, Mr. Walsh, and Mr. Caldwell, in turn].

583 Mr. TAULANE. Are these the two sheets of paper you handed to the witness previous to the adjournment?

Mr. SMITH. Yes, sir.

CHARLES SEIDER, Jr., resumed the stand and further testified as follows:

Direct examination by Mr. SMITH (continued):

Q. Mr. Seider, I show you these two sheets of paper which I have just shown the gentlemen on the other side and ask you if these are the two sheets of paper, which I showed you this morning, and which I asked you whether they refreshed your recollection [showing witness two sheets of paper]?

A. Yes, sir.

Q. They are the same two sheets of paper, are they?

A. Yes, sir.

Q. I understood you to say this morning that your father didn't join the jobbers' association.

A. Right.

Q. Now, has there been any time in the past two years when your orders for goods given to the American Tobacco Company were rejected or not filled?

A. Yes, sir; there were.

Q. When was that?

A. When?

Q. Yes. When I mentioned tobacco companies, I speak first of the American Tobacco Company.

A. Why, as far as I can remember, about April the 30th, I think—from about April the 30th; I think April the 30th was the last invoice received—to July 12th, I believe.

584 Q. Have you any records by which you can verify your statement?

A. As to some, yes; the invoices.

Q. Will you refer to your invoices and tell the examiner the date when you received your last shipment from the American Tobacco Company, in the early part of 1921?

(Papers produced and handed to witness.)

Mr. WALSH. The witness has already testified that it was about from April 30th till July 12th.

Mr. SMITH. I am asking him now to refer to his invoices, so that we can be absolutely certain.

Mr. CALDWELL. I object to this on behalf of the Lorillard Tobacco Company as not binding upon them.

(Objection noted.)

A. These are the last invoices received at that time.

Q. What are the dates of them?

A. April 30th.

Q. 1921?

A. Yes, sir.

Q. When were the next goods received by you after April 30th, 1921?

A. The next was July 12th.

Q. 1921?

A. Yes, sir.

Q. In the period between April 30th, 1921, and July 12th, 1921, did you try to buy from the American Tobacco Company?

A. I had orders out at that time.

585 Q. You had put your orders in the hands of the American Tobacco Company?

A. Yes, sir.

Q. Do you remember when these goods that were ordered before April were to be delivered?

A. When they were to be delivered?

Q. Yes.

A. They were supposed to be delivered the same as the standing orders.

Q. How many orders did you have out with the American Tobacco Company on April 30th?

A. I had at least two or three standing orders.

Q. Did you have any other orders out?

A. I believe I did have some at the time.

Q. What do you mean by standing orders?

A. Orders that were shipped to me either weekly or twice monthly, or monthly.

Q. When are the standing orders given?

A. At any time.

Q. Do they call for delivery for a period of time?

A. Why, either weekly or monthly, or every two weeks.

Q. What was the longest order in the last three years that you have had standing with the American Tobacco Company?

A. They have varied all the time.

Q. What has been the longest time, to the best of your recollection?

A. What?

Q. What has been the longest standing order?

A. You mean, what product?

Q. No; I mean the period of time.

A. Well, it was around three or four months possibly.

Q. That delivery should have been how often?

A. Weekly.

586 Q. When the goods that you ordered from the American Tobacco Company prior to April 30th, 1921, were not received, what, if anything, did you do?

A. Why, I wrote some letters to the American Tobacco Company, and then when I could not get any satisfaction, I went to New York.

Q. Did you have any correspondence with the American Tobacco Company?

A. Yes, sir.

Mr. SMITH. Mr. Examiner, I have here two letters, one dated May 13th, 1921, to Charles Seider, from the American Tobacco Company, and at the bottom of it is written in lead pencil what appears to be a letter. I have also another letter dated August 13th, 1921, from the American Tobacco Company to Charles Seider. Both of these I asked to have marked for identification.

(Letters marked for identification.)

By Mr. SMITH:

Q. Mr. Seider, what is this letter dated May 13th, 1921, to be known as commission's Exhibit No. 25?

A. Do you want me to read it?

Q. Look at it and say what it is.

A. (Examining letter.) It is a letter from the American Tobacco Company to my father.

Q. At the bottom of this letter from the American Tobacco Company to your father there appear some words written in lead

587 pencil. What do these words mean? What are they?

A. Reply to the letter of May 13th.

Q. It is a copy of the reply, I think you mean, to this letter dated May 13th, 1921, known as commission's Exhibit No. 25.

A. Yes, sir.

Mr. CALDWELL. Are these letters being offered in evidence?

Mr. SMITH. This paper which has been marked for identification is offered in evidence, and I ask that it be marked "Commission's Exhibit No. 25." This other letter includes both the letter from the

American Tobacco Company to Charles Seider to the American Tobacco Company in reply to the letter of the American Tobacco Company, the reply being in lead pencil at the bottom of the type-written letter.

Mr. CALDWELL. Let me see it.

(Paper handed to counsel.)

Mr. CALDWELL. I object to the offer on behalf of the Lorillard Tobacco Company.

(Paper admitted, commission's Exhibit No. 25.)

By Mr. SMITH:

Q. Mr. Seider, I show you this letter marked for identification and to be known as commission's Exhibit No. 26, and ask you what it is showing witness paper?

A. It is a letter from the American Tobacco Company to Charles Seider.

588 Q. I notice at the bottom of this letter written in lead pencil the words, "Cancelled above orders." Who wrote those words at the bottom of commission's Exhibit 26?

A. I did.

Q. What do these three words mean?

A. I would like to look at that letter again.

(Letter again shown to witness.)

Q. What is your answer, Mr. Seider?

A. That refers to orders that had been standing, and they started to reship us, and they told me they had cancelled the standing orders owing to the fact that possibly we would be able to do with the merchandise that they had shipped on our orders that were closed—the former orders.

Q. I notice this letter from the American Tobacco Company, known as commission's Exhibit No. 26, suggests the cancelling of the old orders, because of their not being in prime condition when the goods would reach you. Do these three words at the bottom of that letter refer to that suggestion?

A. What words?

Q. "Cancelled above orders."

A. Yes.

Q. These words were suggested by the letter of the American Tobacco Company?

A. Yes, sir.

Q. Did you write any other letters to the American Tobacco Company from April 30th, 1921, to July 12th, 1921?

A. I might have, but I don't recollect them.

Q. Do you keep copies of your letters?

A. Not those letters; no, sir.

589 Q. And you don't remember whether you wrote letters to the American Tobacco Company other than those of which I have shown you copies?

A. I wrote others, I believe. When I visited New York, I asked why didn't I receive information regards to my delayed orders.

Q. Did you go to New York after April 30th, 1921?

A. Yes, sir.

Q. Did you see the American Tobacco Company?

A. Yes, sir.

Q. When was that?

A. I can't recall exactly. I imagine it was around May 10th, around there, or May 11th.

Q. When you visited the American Tobacco Company in New York?

A. Yes, sir.

Q. Who did you see there?

A. Why, I went to see Mr.—I didn't go to see anybody in particular except the American Tobacco Company. I told them what my errand was, and I was referred to—first I was told that Mr. Bevell would be the man I wanted to see, but he was out of town, and then they referred me to—I believe his name was Mr. Hopkinson, and I told him about my errand. I asked if there was any reasons for delaying my orders; that it possibly might be for credit reasons, being as I received a letter from the credit department. He informed me—he looked through some letters or papers before him—that I would hear later when Mr. Bevell returned.

Q. That was Mr. Hopkinson who informed you, was it?

A. I believe so; yes.

Q. Who else did you see or spoke to before you saw Mr. Hopkinson?

590 A. Nobody but the man at the door that receives their card, I believe.

Q. He referred you to Mr. Hopkinson?

A. Yes, sir.

Q. What did you say to Mr. Hopkinson?

A. I told him my reasons for being there, that I hadn't received any of my standing orders, and I told him I didn't know why I wasn't receiving them. I told him that I thought it was possibly on account of the financial end of it, since I received a letter from the credit department.

Q. Did you receive any other letters—

A. That is all I have.

Q. Did you receive any letters from the American Tobacco Company other than those marked "Commission's Exhibit No. 25 and 26"?

A. That I can't recall. If I have, they have been either lost or destroyed. That is all I thought was of any importance. Those that I thought of no importance I threw away.

Q. There may have been other letters that you don't have?

A. Possibly.

Q. Was there anything further you said to Mr. Hopkinson?

A. No, sir.

Q. Have you told us all that Mr. Hopkinson said to you on that occasion?

A. Yes.

Q. Were you to New York to see the American Tobacco Company any time other than this once you speak of?

A. No, sir.

Q. Did you see any other official or representative of the American Tobacco Company in the time between that occasion and July 12th, when your goods started to come in again?

A. I believe Mr. O'Boyle.

Q. Where did you see Mr. O'Boyle?

A. My office, 4th & Race Streets.

Q. Was there anybody else there?

A. No, sir.

Q. About what time did you see Mr. O'Boyle?

A. I don't recollect.

Q. Is this Mr. O'Boyle you speak of the same Mr. O'Boyle whose name has been mentioned this morning?

A. Yes, sir.

Q. What did Mr. O'Boyle say to you on this occasion, between the period May 10th, when I understand you visited the American Tobacco Company in New York, and July 12th, when goods were again shipped to you?

Mr. WALSH. I object. It does not appear that Mr. O'Boyle was within the scope of his authority in making any statement or admission, or reference to the policies of the American Tobacco Company, and because the testimony is irrelevant and immaterial.

Mr. CALDWELL. I also object, as in no way binding upon the Lorillard Tobacco Company.

Mr. TAULANE. I also object for the same reason.

(Objection overruled.)

(Exception.)

By Mr. SMITH:

Q. Do you remember the question?

A. Yes, sir.

Q. What did Mr. O'Boyle say?

A. Mr. O'Boyle at that time advised me to go along with the conditions, that is, to join the association.

Q. Tell us as near as you can, Mr. Seider—

Mr. WALSH. I move to strike out the answer as not being responsive. The witness is simply giving his conclusions when he says Mr. O'Boyle advised him.

By Mr. SMITH:

Q. Tell us as near as you can what Mr. O'Boyle said to you.

Mr. CALDWELL. I make the same objection on behalf of the Lorillard Tobacco Company.

A. He advised us to join the association.

Mr. WALSH. I move to strike out the answer as being irresponsible. Counsel asks witness what Mr. O'Boyle said to him and the witness

gives his conclusions—not what Mr. O'Boyle said. He is asked: "What did Mr. O'Boyle say to you?" and he answers, "He advised us." Counsel asks the question to find out what Mr. O'Boyle said.

593 The EXAMINER. If the witness gives the substance of what Mr. O'Boyle said to him, and he so interprets it, I don't think he is obliged to state exactly what the language was. He can state what Mr. O'Boyle said to him as nearly as he can remember it.

By Mr. SMITH:

Q. What did Mr. O'Boyle say to you?

A. Advised us to join the association, and I asked him if it would help us in getting our shipments, and he told me he thought it would. He advised me then to go and see a Mr. Narrigan, who was then acting, I believe, president for the association in the absence of Mr. Overbeck. I went to Mr. Narrigan and I told him what I was there for. He told me that a committee of two would serve on me as regards joining the association.

Q. "Would serve on you." You mean would visit you?

Mr. WALSH. Let him say it himself.

A. That's about it.

Q. After that did a committee of two visit either you or your father?

A. No.

Q. Did you say anything else to Mr. Narrigan except what you have told us?

A. No, sir.

Q. Did Mr. Narrigan ask you anything about your future policy?

A. No.

594 Q. How long after this occasion when Mr. O'Boyle visited you, after you had been to visit the American Tobacco Company in New York, did you next receive any goods from the American Tobacco Company?

A. I don't remember that.

Q. After he visited your place—do you remember how long after that you next received shipments from the American Tobacco Company?

A. No; I could not say.

Q. Did you tell Mr. O'Boyle you would not join the association?

A. I told him I would go to see Mr. Narrigan.

Q. What did Mr. O'Boyle say to you?

A. I don't remember what he did answer.

Q. Do you remember the date when you received the last shipment from the Lorillard Tobacco Company, or can you tell us if it was previous to April 30th, 1921?

A. April 12th, I believe.

By Mr. CALDWELL:

Q. What date?

A. April 12th—April 15th, to be correct.

By Mr. SMITH:

Q. When was the next shipment you received from the Lorillard Tobacco Company after the shipment you received on April 15th?

Mr. CALDWELL. Objected to on the ground that it is immaterial, incompetent, and irrelevant. It must first be shown what effort, if any, was made to order and receive goods.

(Objection overruled.

Exception.)

By Mr. SMITH:

Q. When?

A. November 1st.

Q. 1921?

A. 1921.

Q. Do you have the invoices from the Lorillard Company before you?

A. Yes, sir.

Q. And have you given these dates, April 15th and November 1st, 1921, by referring to your invoices?

A. No, sir.

Q. How have you given these dates?

A. From memory.

Q. And not from your invoices?

A. No.

Q. Do the invoices before you show the exact dates of these shipments?

A. Yes, sir.

Q. And the dates you gave as to the receipt of the American Tobacco Company's products, did you give these dates with the American Tobacco Company's invoices before you?

A. Yes, sir.

Q. And both sets of invoices are before you as we sit here in this proceeding?

A. Yes, sir.

Q. In the period from April 15th, 1921, and November 1st, 1921, when you didn't receive any shipment from the Lorillard Tobacco Company, did you try to buy from the American Tobacco Company?

Mr. CALDWELL. Objected to as calling for a conclusion. I think the date should be given.

The EXAMINER. Has the witness answered?

Mr. SMITH. I think the witness has answered.

Mr. WALSH. I must say I didn't hear him answer.

The EXAMINER. Strike that all out.

By Mr. SMITH:

Q. In the period from April 15th, 1921, and November 1st, 1921, when you did not receive from the Lorillard Tobacco Company any of their products, what, if anything, did you do?

A. I wrote them and told them that we had received no goods.

Q. You wrote to the Lorillard Tobacco Company?

A. Yes, sir.

Q. Do you have any copies of your letters to the Lorillard Tobacco Company?

A. No; I haven't.

Mr. SMITH. I have here four papers, Mr. Examiner, which I ask to have marked for identification and offer as "Commission's Exhibit No. 27, Commission's Exhibit No. 28, Commission's Exhibit No. 29, and Commission's Exhibit No. 30."

(Papers produced and marked as above.)

397 By Mr. SMITH:

Q. Mr. Seider, I show you this paper offered as commission's Exhibit No. 27, and ask you what it is?

(Witness shown commission's Exhibit No. 27.)

A. It is a letter.

Q. From the Lorillard Tobacco Company to Charles Seider?

A. Yes, sir.

Mr. CALDWELL. What is the date of that?

Mr. SMITH. It is dated May 2nd, 1921.

By Mr. SMITH:

Q. I notice the first paragraph of this letter states as follows: "Replying to your letter of April 30th, we ask that you kindly place your orders for our products with the jobbers' association." Did you write to the Lorillard Tobacco Company on April 30th, 1921?

A. I sent a reply to them that it was impossible for me to buy their products to compete with the jobbers' association; that is, the local jobbers' association.

Q. I ask you whether you wrote a letter to the Lorillard Tobacco Company on April 30th, 1921?

A. Yes, sir.

Q. Do you have a copy of that letter?

A. No.

598 Q. Do you remember what you said in it?

A. That is the reply that I have just explained.

Q. What was it?

A. I wrote stating that I was unable to buy their products from the local jobbers to compete with the local jobbers.

Q. Did you have that letter before you when you wrote?

A. Yes, sir.

Q. This letter known as commission's Exhibit No. 27?

A. Yes, sir; I believe I had two letters—I don't know whether I had two letters or not from the Lorillard Company, but they were practically the same. Which one I answered I have no recollection of.

Q. Do you remember writing to the Lorillard Company that you were not getting their products and asking why?

A. I believe I wrote that letter.

Q. Is this letter, known as commission's Exhibit No. 27, the reply which you had from the Lorillard Tobacco Company?

A. I believe it is.

Q. I show you a letter which has been marked "Commission's Exhibit No. 28" for identification; tell us what that is, please.

(Witness shown commission's Exhibit No. 28.)

A. A letter sent to the Lorillard Company.

Q. Copy of a letter?

A. Yes; copy.

Q. Of a letter sent to the Lorillard Company, dated May 4th, 1921, is it?

A. That is the original letter.

399 Mr. CALDWELL. Are you speaking of Exhibit No. 28?

Mr. SMITH. Yes.

Mr. CALDWELL. That is a letter written by your witness.

Mr. SMITH. Yes.

By Mr. SMITH:

Q. Was that letter which you sent to the Lorillard Tobacco Company, dated May 4th, in typewritten form or in long-hand?

A. Typewritten.

Q. Commission's Exhibit No. 28 was typewritten?

A. Yes, sir.

Q. I show you commission's Exhibit No. 29, marked for identification. Will you tell me what that is?

(Witness shown commission's Exhibit No. 29.)

A. A letter from the Lorillard Tobacco Company to Charles Seider.

Q. In reply to your letter dated May 4th?

A. Yes, sir.

Q. A reply to the letter of the Lorillard Tobacco Company known as commission's Exhibit No. 28?

A. Yes, sir.

Q. What letter is this, known as commission's Exhibit No. 29?

A. A reply.

Q. What is it a reply to?

A. The letter dated May 4th.

600 Q. Which is known as commission's Exhibit No. 28?

A. Yes, sir.

Q. Are there any other letters you wrote to the Lorillard Tobacco Company outside of those that are before you?

A. I don't recall any others.

Q. I show you this letter which has been offered as commission's Exhibit No. 30, dated October 14th, 1921; tell us what it is.

A. A letter from the Lorillard Tobacco Company to Charles Seider, dated October 10th, 1921.

Q. Have you a copy of that letter of October 10th?

A. No.

Q. In 1921, did you visit the Lorillard Tobacco Company in New York?

A. Yes, sir.

Q. Do you remember when that was?

A. I visited the two companies at the same time. I judge it was around May 10th or 11th.

Q. You visited both the American Tobacco Company and the Lorillard Tobacco Company?

A. Yes, sir.

Q. Who did you see at the Lorillard Tobacco Company's office?

A. I asked to see Mr. Ball.

Q. Who is Mr. Ball?

A. I believe he is the vice president, one of the vice presidents of the company.

Q. What did you say to Mr. Ball?

A. I asked Mr. Ball if he knew the reason why my orders were discontinued being shipped.

Q. And what did Mr. Ball say?

A. Mr. Ball told me that it was with the board of sales managers, and they had decided to discontinue me as a direct buyer.

601 Q. What else, if anything, did Mr. Ball tell you?

A. I asked him if it was—how long this would continue, and he told me it was an experiment and would last for about six months.

Q. Did you endeavor to get goods from the Lorillard Tobacco Company on this occasion?

A. When I was there?

Q. Yes; on this occasion of your visit.

A. No.

Q. Was that what you went there for?

A. I went to find out why I wasn't getting goods.

Q. Did Mr. Ball give you any reason for not selling to you direct?

A. His reason was—the reason he gave me was the board of sales managers.

Q. Did you receive a circular from the Lorillard Tobacco Company about Beechnut cigarettes?

A. Yes, sir.

Q. When was that?

A. That was during the period that I didn't receive any other orders, between April 15th and November 1st.

Q. Have you a copy of that circular?

A. No.

Q. When you received that circular from the Lorillard Tobacco Company about their Beechnut cigarettes, what did you do in connection with that circular?

A. I wrote them a letter and gave them an order for some Beechnut cigarettes.

Q. Was that order accepted?

A. Not that I know of.

Q. Did you ever receive any goods on that order?

A. No, sir.

Q. Did you ever get any reply from the Lorillard Tobacco Company?

A. No, sir.

602 Q. Never any goods?

A. No, sir.

Q. In this interview that you had with Mr. O'Boyle when you were no longer getting goods from the Lorillard Tobacco Company, how did you sell your tobacco products with respect to the discount?

A. Discount?

Q. Yes; did you change your discount or did you continue your old discount?

A. I had to sell under the prices that I had to buy them for at the time.

Q. What was the rate of discount in your trade?

A. In our trade—anywhere from the list price to ten off.

Q. After the interview that you had with Mr. O'Boyle, while you were not receiving goods from the Lorillard Tobacco Company, did you make any change in your discount to your customers?

A. No.

Q. You kept on at the same rate of discount?

A. Yes, sir.

Q. Did you say anything to Mr. O'Boyle as to what you would do when he suggested that you join the association?

A. I don't recall, if I did.

Q. Do you remember telling him you were willing to join?

A. I believe I did make that statement.

Q. And that you would sell at the discount fixed by the association?

A. I told him that I would join, I would go along with the association.

Q. Didn't you tell him you were willing to join and would 603 stay by the prices fixed by the association?

A. Yes; after he suggested to go to see Mr. Narrigan.

Q. You told him you were willing to join and would abide by the prices of the association?

A. Yes, sir.

Q. Why did you do that, Mr. Seider?

A. So that I would be able to get merchandise from these companies.

Q. Why did you want the American Tobacco Company's products?

A. They were a necessity.

Q. Why did you want the Lorillard Tobacco Company's products?

A. For the same reason.

Q. What do you mean when you say these goods were necessities?

A. They were the big sellers.

Q. I understood you to say that you had a letter from the American Tobacco Company that they would not accept your orders.

A. No; I have no letter.

Q. I think you said you got a letter from the credit department.

A. I did; I had that time when I went over to New York. That was my reason for going to New York, to find out what the trouble was.

Q. Mr. Seider, did you ever have any financial credit trouble with the American Tobacco Company?

A. No; not that I know of. All orders were paid for.

Q. Or with the Lorillard Tobacco Company?

A. No, sir.

604 Cross-examination by Mr. WALSH:

Q. When did you go into business with your father, Mr. Seider?

A. I went into his employment about sixteen years ago.

Q. About sixteen years?

A. Yes, sir.

Q. Your father testified this morning that during the first months of 1921, January, February, and March, your trade—that is, your business with the American Tobacco Company and the Lorillard Tobacco Company—improved very materially.

A. Yes.

Q. That is right?

A. Yes, sir.

Q. Why was that?

A. Why, simply the reason that we had to compete with the local conditions. In other words, give larger discounts than we had previously given to the trade.

Q. What had you previously given to the trade?

A. Previous to 1920 we tried to sell at the list prices.

Q. At the list prices?

A. Yes.

Q. What discount?

A. In some cases we sold for two per cent off, according to the volume of business that we had, and again we sold as high as five per cent off. Five per cent was our limit.

Q. Then you concluded you would give ten per cent off; is that true?

A. We pretty near lost all our business, so we had to give ten per cent off to compete with the jobbers.

Q. At that time the jobbers were giving ten per cent off, were they?

A. So I heard.

Q. When you started to give ten per cent off your business correspondingly increased?

A. Yes.

605 Q. Did you at any time give a greater per cent discount than ten per cent off?

A. Yes, sir.

Q. What was that?

A. Ten and one.

Q. You had trebled your business at ten and one off?

A. Well, I will say, yes.

Q. How long did that period exist?

A. From the latter part of 1920 up till the present time.

Q. From 1920 till the present time?

A. Yes.

Q. On June 12th, 1921, the American Tobacco started to ship goods to you?

A. July 12th.

Q. Yes, July 12th.

A. Yes, sir.

Q. 1921?

A. Yes, sir.

Q. The American Tobacco Company then started to ship goods to you?

A. Yes.

Q. And you have been making as high as ten per cent and ten and one per cent off on your contract?

A. Yes.

Q. And as high as eleven per cent.

A. No, ten and one.

Q. Which mean eleven, does, it not?

A. No.

Q. What is this ten and one per cent?

A. I imagine there is a little difference.

Q. What is it; I don't know?

A. I don't know—

Q. If I am buying goods from you at ten and one, what would the discount amount to—one for cash and ten off on time?

A. No.

Q. Ten per cent off for time and one off for cash?

A. (No answer.)

Q. So that after July 12th, 1921, the American Tobacco Company sent goods to you no matter what your price was?

A. Yes, sir.

606 Q. And you never made any promise as to what price you were to sell your goods?

A. No.

Q. Neither did the American Tobacco Company ever exact from you any promise or agreement as to what prices you would sell your goods?

A. No.

Q. And never gave you any orders about selling your goods at any particular price?

A. No.

Q. That is true?

A. Yes.

Q. Now, I understand you had two conversations with Mr. O'Boyle, one in January, 1921, and one later on, isn't that true?—?

A. One was previous to being cut off and the other one was after that.

Q. The first one, I understand, was in January, 1921?

A. I don't recall; I can not say.

Q. You heard your father testify this morning, and give a description of a man who was there talking to him at your place of business?

A. Yes, sir.

Q. As the man who was there in January?

A. Yes, sir.

Q. The description does not fit Mr. O'Boyle, does it?

A. Hardly.

Q. You heard your father testify this morning that you were present when O'Boyle asked your father if he would not comply with the prices that were given out by the association; is that true?

A. Yes.

Q. Did O'Boyle say anything more at any time about the price at which you were selling your goods?

A. No, sir.

607 Q. How did he come to say anything about complying with the association prices?

A. How—I don't know. I suppose from outside gossip or rumors of what had been doing.

Q. That is, he asked him if he would not sell his goods at prices more in conformity with what the others were getting?

A. I don't recall.

Q. That was the substance of it?

A. It was the substance; yes.

Q. And Mr. O'Boyle, the first time, never said anything to you about joining the association at all, did he?

A. No, sir.

Q. Didn't suggest that you should join it?

A. No, sir.

Q. Didn't say a word that if you didn't sell your goods at a certain price, you were liable to be cut off?

A. No, sir.

Q. Nobody told you that?

A. No, sir.

Q. Now, the occasion of the next conversation with Mr. O'Boyle was about when, Mr. Seider?

A. It followed after April 30th.

Q. Some time after April 30th.

A. Yes.

Q. Probably in the month of May, 1921?

A. Probably so.

Q. You say that at that time Mr. O'Boyle advised you to go along with the association?

A. Yes, sir.

Q. Did Mr. O'Boyle say anything to you about the prices at which you were selling your products?

A. No.

Q. He said nothing?

A. No.

Q. You say he advised you to join the association?

A. Yes.

608 Q. In what way did he do that?

A. I suppose—

Q. I don't want your suppositions, Mr. Seider. This is an important matter to the American Tobacco Company, and I wish you to state as near as you can what Mr. O'Boyle did say to you about that time about the association.

A. The conversation at that time was with reference to the association and the prices we were selling our goods at. That was the substance of Mr. O'Boyle's talk, I believe.

Q. What was the substance?

A. To know at what prices we were selling our goods at, selling our merchandise. I believe that was his reason for calling to see us.

Q. Yes.

A. And then I told him that if it was a case of getting merchandise, why—this was after he told me to go and see Mr. Narrigan—I said, "If it is to join the association to get merchandise, I will join it; if I do join it, I will uphold their prices," but I said "I don't care about joining it." I knew—I didn't know; I suppose I heard from the trade, going around the trade selling products—that some of the members of the association were not upholding their own prices.

Q. And you found that was generally true, wasn't it?

A. Yes, sir.

Q. Then what did he tell you about going to Mr. Narrigan?

A. He told me to go over and talk with Mr. Narrigan.

Q. Just what did he say to you?

A. That is what he said—told me to see Mr. Narrigan.

609 Q. Have you told us all that he did say?

A. Told me to see Mr. Narrigan and talk to him about joining.

Q. Was that all?

A. All that I remember.

Q. Then he did not suggest to you why you should join or should not join; is that true?

A. He made no direct assertion that we should join—just made it as a suggestion, I took it.

Q. You took it from what he said that so far as he was concerned and so far as you were concerned, it didn't make any difference whether you joined it or not—joined the association or not; isn't that true?

A. Yes, sir.

Q. You say you went to see Mr. Narrigan?

A. Yes.

Q. What was your talk with Mr. Narrigan?

A. It was my first visit to Mr. Narrigan, the first time I had met him. I introduced myself and he was very nice to me. He explained to me their organization, the way they were running the organization, and he quoted me prices, and said he would like to take the matter up with the association, and that a committee of two would call upon me in a couple of weeks, I think he said.

Q. He didn't say whether he wanted you in the association?

A. Pardon.

Q. He didn't say whether he wanted you in the association?

A. No.

Q. What did he say about a committee?

A. He said he would refer to the association and that a committee would call later on.

Q. Did a committee call?

A. No.

610 Q. You think it was a man by the name of Hopkinson you saw in New York?

A. I believe that is his name, as far as I recall.

Q. Wasn't the name Hodgison?

A. I don't know it by that name. I thought it was Mr. Hopkinson.

Q. When you went to the office of the American Tobacco Company in New York, you had no conversation about prices?

A. No.

Cross-examination by Mr. CALDWELL (continued):

Q. Mr. Seider, referring to your trip to New York on or about May 10th or May 11th, 1921, you say you saw Mr. Ball?

A. Yes, sir.

Q. Don't you remember asking Mr. Ball if your firm would join the association, would your firm be able to get goods, and didn't Mr. Ball say to you it made no difference to him what you did, that he was not interested in the association; didn't he say that?

A. Yes.

Q. That occurred?

A. Yes.

Q. And didn't he also say to you that the company was taking of a lot of small buyers all over the country—do you remember that?

A. Well, he didn't just say that. He cited an instance in Washington of a man being taken off for lack of volume.

Q. Now, you used the word "experiment." Mr. Ball didn't use that word, did he?

A. I believe he did. I don't know why I should mention it if he didn't.

Q. Don't you remember practically that Mr. Ball made use of the word "experiment" specifically?

A. Why, I recall that. He told me it was an experiment.

Q. He told you that the board of sales managers had a meeting with reference to that matter, didn't he?

A. He told me that they had a meeting of the board of sales managers and he told me they had decided discontinuing selling to me on account of volume. I asked him how far this had gone back, on account of volume, and he said for the past three years previous to 1920.

Q. Now, isn't it the fact, Mr. Seider, according to your best recollection, that the volume of your business in 1917 was about \$2,100, with the Lorillard Tobacco Company?

A. Yes, sir.

Q. And the volume of your business in 1918 was about \$2,000?

A. I should judge about that.

Q. And that the volume of your business in 1919 with the Lorillard Tobacco Company was about the same, \$2,000?

A. Yes, sir.

Q. And in 1920 the volume of your business from the Lorillard Tobacco Company was about \$2,800?

A. What month?

Q. In 1920—that the volume of your business from the Lorillard Tobacco Company was \$2,800 to \$3,000?

A. I will say so.

Q. You will say so?

A. Yes.

Q. Now, then, the volume of your business for the month of January, 1921, itself was over \$2,000, wasn't it?

A. Yes.

Q. With the Lorillard Tobacco Company?

A. Yes.

Q. And in February of last year it was over \$2,000?

A. Yes, sir.

Q. And in the month of March of last year it was over \$2,300?

A. Yes.

Q. With the Lorillard Tobacco Company, wasn't it?

A. Yes, sir.

Q. And for the month of April the volume of your business from the Lorillard Tobacco Company was over \$2,600?

A. About these figures.

Q. So that practically the volume of your business for the first four months of 1921 was equal to the entire volume of your business from the Lorillard Tobacco Company for the four preceding years; is that about right?

A. Yes, sir.

Q. Now, at this time in 1921 you were selling to retail dealers ten per cent off discount—a trade discount of ten per cent off?

A. I was selling at prices anywhere from the list price up to ten and one.

Q. The greater part of it was at ten per cent off or ten and one off wasn't it?

A. Naturally so, or I would not have the volume.

Q. Do you know of any jobbers in Philadelphia who were in existence at that time had failed in business?

A. Do I know of any who failed in business?

Q. Yes.

A. That were in existence at that time?

Q. Yes.

A. No.

Q. You don't recall any?

A. No, sir.

Q. When you were doing business in that way you were not making a profit in your business when you count the overhead costs?

A. We were making profit.

Q. You could not do business at two per cent?

A. Well, we could pay the bills—that was on account of the volume.

Q. But when you were doing that kind of business you were not making any money on those particular sales, were you?

A. No, sir.

Q. Your father stated this morning that your firm was adverse to making a financial statement to Bradstreet and Dunn in 1920 and 1921—that was during the improvement in the business of the firm; isn't that true?

A. He gave a statement to the Lorillard Tobacco Company when they asked for it.

Q. That is just what he didn't do?

A. What he didn't do?

Q. Yes.

A. I think so.

Q. The Lorillard Company never got that statement, did they?

A. They never got the filled out form—they got the figures.

Q. They asked for a statement, but never got a correct statement, did they?

A. At the time they asked for the figures they called to see us.

Q. They got a form and never filled it out?

A. We have never been requested; I don't know whether they forgot it or not.

Q. You have been asked something about some letters from the Lorillard Tobacco Company which have been marked for identification, Nos. 27, 28, 29, and 30, and these purport to be signed

614 by Mr. Sidney Kelly. Do you recall whether Mr. Kelly is connected with the credit department of the Lorillard Tobacco Company?

A. No; I can't recall.

Q. He has since been appointed assistant auditor. Do you know Mr. Sidney Kelly at all?

A. No; I don't recall ever having met him.

Q. Mr. Seider, I show you a letter from the Lorillard Tobacco Company, dated April 20th, 1921, and ask you if this letter refreshes your recollection at all, as to whether or not there was a question of credit reasons entering into the talk between you and Mr. Ball.

(Letter shown witness.)

A. I don't recall any mention of credit at all.

Mr. CALDWELL. I ask that this paper, which bears date, April 20th, 1921, with the letterhead of the Lorillard Tobacco Company, be marked for identification as "Lorillard Tobacco Company's Exhibit No. 2."

(Paper marked as requested.)

By Mr. CALDWELL:

Q. Mr. Seider, after April 15th, 1921, did any representative of the Lorillard Tobacco Company exact any promise from you or your firm as to what prices you should sell your goods, did they?

A. No, sir.

Q. Or before that time?

A. No, sir.

615 Q. And neither before or after April 15th, 1921, did you and the Lorillard Tobacco Company, or any of its representatives, make any agreement as to what prices you should sell your goods?

A. No, sir.

Q. And there was no request made to you by any representative of the Lorillard Tobacco Company as to what prices you should sell your goods, was there?

A. No, sir.

Q. And there was never any threat or statement made to you that if you didn't sell the Lorillard Tobacco Company's goods at any particular price that you would be cut off?

A. No, sir.

Q. I think you said that the last shipment in the early part of 1921 that you received from the Lorillard Tobacco Company was under date of April 15th, 1921; is that correct?

A. It was the last.

Q. That was the last shipment you received?

A. Yes, sir.

Q. Now, during the months of June, July, August, and September, or October, 1921, you didn't place any orders with the Lorillard Company for any of their products, did you?

A. Why, I placed orders, yes; just a few of these months.

Q. What month did you start, then—June?

A. No.

Q. Was it during these months you didn't make any effort to buy from the Lorillard Tobacco Company any of its products—I limit it to these months?

A. In the latter part of October I must have made an attempt.

616 Q. Well, when you did make an attempt in October, then you got your goods, didn't you?

A. Yes.

Q. And from that time when you began to make an attempt up to the present time you have continued to get your goods, haven't you?

A. Yes.

Q. Did you answer yes.

A. Yes, sir.

Q. Mr. Seider, do you recall that you took seventeen days within which to pay the last two bills of the Lorillard Tobacco Company for goods ordered in April, 1921?

A. No; I don't recall that.

Q. That would be correct, would it not?

A. I would have to look up the record; I forget.

Q. At that time you were extending your business, from July, were you not?

A. Yes, sir.

Q. And in previous years, during the years 1917, 1918, 1919, and 1920, you had been accustomed to paying your bills promptly, practically within the ten days' or eight days' period?

A. I could not tell you that—that would be for the bookkeeping end of it.

Q. When I speak about you I speak about the firm.

A. Well, I could not tell you that without I would look up the records.

Q. When you saw the representative of the Lorillard Tobacco Company, at the request of Mr. Ball, and inquired why you hadn't received your goods, the latter part of April, 1921, did
617 you think it might be on account of financial or credit reasons?

(Objected to.)

A. I don't know why I was cut off; that was the reason I went to New York to inquire.

Q. You thought it might be due to your large extension of your business, not for credit reasons?

A. No, I would not say that in regard to the Lorillard Tobacco Company. I could say that in regard to the American Tobacco Company, because I received a letter from Mr. Hagerty, of the American Tobacco Company, credit department.

Q. Didn't you think the same thing might be true with reference to the Lorillard Tobacco Company?

A. I could not say why, because I always thought our bills were paid promptly. We never had any reason to believe it, never had any complaints. I think the last invoices that I have—I think they were all in one check.

Q. Will you please say whether the dates of the orders are not different dates?

A. One is 13th; the latter two 15th.

Q. When were they paid?

A. I think the date I have here—I see they are all in one check. It may be that.

Q. I ask you if it is your recollection that that order was paid on May 2nd?

A. That is the date the Lorillard Company received it.

Q. Yes.

A. It is possible we mailed it over one or two days previous to that.

618 Q. And you may have mailed it the same day from Philadelphia to New York, may you not?

A. Well, I don't know. If we mailed it that evening it would not get there till next day; that is usual, but I don't think it is over fifteen days from the date on the envelope.

Q. Well, it is over ten days.

A. It is over ten days; yes.

Q. Mr. Seider, after April 15th, 1921, your firm was not requested by anyone representing the Lorillard Tobacco Company to make any promise or to have any understanding of any kind in order to have the Lorillard Tobacco Company again ship you their goods?

A. No, sir.

Q. Do you recall stating to Mr. Ball on the occasion of your visit to him in May, 1921, what discount you were allowing for the Lorillard Tobacco Company's goods?

A. I don't recall mentioning that—if I did, I don't recall it.

Q. Do you recall stating to him in substance that you were allowing a large discount?

A. In substance?

Q. Yes; and by that means that you were getting a large volume of business?

A. I told him if I wanted to compete with the local jobbers, I could easily get the volume of business.

Q. By allowing large discounts?

A. Yes, sir.

Q. As a matter of fact you were, prior to the time of your visit, allowing a discount, as you have said, of ten per cent off?

A. Not April, 1919.

619 Q. I am not talking about April, 1919; I am talking about prior to your visit on May 10th, 1921.

A. At the time I visited I had given ten off.

Q. And in talking to Mr. Ball you may have mentioned that to him?

A. I don't believe I did.

Q. You are quite sure you didn't?

A. I am pretty sure I didn't. The question wasn't brought up.

Q. What?

A. I believe the question wasn't brought up; I don't recall it.

Q. Your idea is that you told him that in order to get a large volume of business, you would have to compete with the other jobbers in Philadelphia?

A. Have to sell on the same basis.

Q. And that basis was about ten per cent off, wasn't it?

A. Yes.

Q. And you may have told him that?

A. I didn't say for sure that I told him that. I know we spoke of how to get a volume of business in Philadelphia.

Q. Now, between April 15th, 1921, and November 1st, 1921, your firm did purchase Lorillard products, didn't it?

A. We purchased products from local jobbers.

Q. During this period?

A. Yes, sir.

Q. And you continued to do business?

A. Yes, sir.

And you did compete with these jobbers?

A. Well, I don't say—I don't know whether we competed with them. We filled orders when we could fill them with a profit.

620 Mr. CALDWELL. Has Mr. Smith offered these exhibits which have been marked for identification, Nos. 27, 28, 29, and 30, in evidence?

Mr. SMITH. I now offer these in evidence and ask that they be marked "Commission's Exhibits Nos. 27, 28, 29, and 30," respectively.

By Mr. CALDWELL:

Q. Mr. Seider, in your letter of May 4th to the Lorillard Tobacco Company you stated that it would be impossible to purchase from the local jobbers and expect you to compete with them. As a matter of fact you did during that period purchase from the local jobbers, didn't you?

A. Yes, sir.

Q. And is it the fact you did sell these goods that you purchased from the local jobbers?

A. Only in cases that I could sell—

Q. I ask you if, as a matter of fact, you did sell goods to local jobbers that you had purchased from the jobbers during that period, did you not?

A. I did.

Q. Take this letter, Exhibit No. 28, which is in pencil in your own personal handwriting.

A. Yes.

Q. Were the erasures in your letter erased from the original?

A. No, sir.

Q. These erasures were not in your original letter?

A. No, sir.

Q. Are you prepared to say whether this is a correct copy or just a substitute?

621 A. It is a copy I made and then re-copied it on the typewriter.

Q. When you make a copy on the typewriter, don't you make a carbon copy?

A. Yes; I might have it; I am not sure. I generally do that.

Q. If you did that, it would be a more correct copy, a more accurate copy than this, wouldn't it?

A. Well, yes; it would.

Q. And you may have made some changes from this in your original letter?

A. I may have, but I can't recall.

Redirect examination by Mr. SMITH:

Q. Mr. Seider, you stated in your cross examination that you and Mr. Ball discussed how you could get a volume of business?

A. Yes.

Q. What was that discussion?

A. Why, he told me we didn't have enough volume; that was the reason for being cut off. I told him that we could easily get a volume, or have a volume. At that time I asked him how far it went back, figuring on volume, and he told me for the past three years.

Q. Did you tell Mr. Ball you could get the volume of business?

A. I told him that by competing with the local jobbers at the same price as they were selling the merchandise, that I could just as easily get the volume as they had.

Q. Did you tell him the prices the jobbers in Philadelphia were getting?

A. I don't recall whether I did or not.

622 Q. How did you explain to Mr. Ball as to your getting a larger volume of business?

A. By selling at the same figure as the local jobbers were selling at.

Q. When was it the Lorillard Tobacco Company gave you this form of a report to be filled out?

A. Prior to November 1st.

Q. 1920?

A. 1921.

Q. Was this report, or this blank, given to you by the Lorillard Tobacco Company prior to the time you were cut off or after that time?

A. It was the middle of the year, after we had received, I judge, one or two shipments.

Q. You mean, after you were restated?

A. Yes; then we received this form to be filled up.

Q. That was November 1st, 1921?

A. Yes, sir.

Q. Is that right?

A. Yes.

Q. Now, prior to November 1st, 1921, did your firm give any financial statement to the Lorillard Tobacco Company?

A. We gave one to two representatives that called.

Q. Do you remember when that was?

A. I judge it was in October some time.

Q. October, 1921?

A. Yes.

Q. Had your credit ever been questioned by the Lorillard Tobacco Company up to the time that they stopped shipping you?

A. No, sir.

Q. Had your credit ever been questioned by the American Tobacco Company?

A. No, sir.

Q. Did Mr. Ball of the Lorillard Tobacco Company at this
623 interview you had with him when you were in New York say anything about your credit?

A. No, sir.

Q. Was the question brought up in any aspect?

A. Not a word mentioned.

Q. It was in no way brought up either by you or Mr. Ball?

A. No, sir.

Q. There was no discussion brought up there?

A. No more than that I asked him if there was any possible reason that we might be cut off.

Q. What did he say to that?

A. I don't remember.

Q. You said in your cross-examination that you didn't try to get goods from the Lorillard Tobacco Company during the period you were cut off. Why didn't you try?

Mr. CALDWELL. I object as being irrelevant and immaterial.

(Objection overruled.

Exception.)

By Mr. SMITH:

Q. Why didn't you try to get goods from the Lorillard Tobacco Company during that period?

A. When I was in New York Mr. Ball informed me that this would be an experiment and would last for six months, and I felt that everything was done and I could simply go no further.

Q. That is the reason you didn't try to get goods?

A. Yes, sir.

Q. At the time you were cut off by the Lorillard Tobacco
624 Company did you have any standing orders with them?

A. I might have had; I don't recollect.

Q. When Mr. Ball stated that they were discontinuing your account because of the volume of your business, did he say they were discontinuing your account because your business was small, or because it was large?

A. He said it was not sufficient.

Q. Were you in 1921 the smallest jobber in Philadelphia, the smallest tobacco jobber?

A. That I can't tell you; I don't think so.

Q. Did you ever see a circular issued by the American Tobacco Company and the Lorillard Tobacco Company to the tobacco trade in 1921?

(Commission's Exhibit No. 10 shown witness.)

A. I recall this one [referring to Exhibit No. 10], but I don't recall the Lorillard Tobacco Company's one.

Q. That is, you recall the American Tobacco Company's circular known as Commission's Exhibit No. 10?

A. I recall one, but I don't know whether it is the same date or not.

Q. Do you recall the substance of this one, which is Exhibit No. 10?

(Witness shown Exhibit No. 10.)

A. Yes, sir.

Q. Did your firm receive a copy of this circular?

A. I believe we did.

625 Q. From the American Tobacco Company?

A. Yes, sir.

Q. Did you receive a copy of the Lorillard Tobacco Company's circular which is known as Commission's Exhibit No. 11?

A. Yes.

Q. After that date did you receive any communication from the Lorillard Tobacco Company?

A. No, sir.

Q. There was a letter received after April?

A. Some time, I believe.

Mr. CALDWELL. The date of the Lorillard Tobacco Company's communication was August 3rd.

Q. Both circulars were received prior to that time, prior to August 3rd, 1921?

A. Yes.

Q. Can you tell us the names of the representatives of the Lorillard Tobacco Company to whom your firm gave a financial report?

A. I can recall Mr. Newman; the other gentleman, I cannot recall his name.

Q. Who is Mr. Newman?

A. One of the salesmen, I believe, of the Lorillard Tobacco Company.

Q. Mr. Seider, how big a building does your firm occupy?

A. Well, it is a four-story building.

Q. Do you occupy all of it?

A. Yes.

Q. How much of it is devoted to manufacture?

A. Not any.

Q. None of it?

A. No.

626 Q. The four floors are used for storage and shipping?

A. Yes; we have a tenant on the fourth floor.

Q. Does your firm own the building?

A. Yes, sir.

Q. How long have they owned it?

A. Really, I don't know.

Q. Is that because it is so far back?

A. Apparently.

By Mr. CALDWELL:

Q. Do you recall the purchase price of that building?

A. Pardon?

Q. Do you recall the purchase price?

A. No; I do not.

Q. Is there a mortgage on it?

A. Yes.

Cross-examination by Mr. TAULANE (continued):

Q. You have said that you sold your goods to increase the volume of your trade, and that you had sold them at the same prices as the other jobbers. What were those prices?

A. It changed around.

Q. Ten per cent off?

A. Less.

Q. At the list price?

A. Yes.

Q. Anything else?

A. Ten and one.

Q. Did you ever sell your goods at ten and two?

A. No, sir.

Q. That was the condition when the association was in existence?

A. Yes, sir.

627 Q. And the manufacturers sold the goods to you at ten per cent off this price and two per cent for cash—ten days?

A. Yes.

Q. If you sold your goods at ten per cent off, you made less money?

A. Yes, sir.

Q. You thought that was a fair price, didn't you?

A. Yes.

Q. And because you didn't sell your goods in that way prior to April, 1921, some of your retail business went away from you, didn't it?

A. No; wholesale.

Q. Is that right?

A. Yes, sir.

Q. Then in 1921 you increased the volume of your wholesale business by selling your goods at less price, didn't you?

A. We sold them to compete.

Q. I understand you sold them to compete—at a list price, was it?

A. We didn't issue a list.

Q. I am talking about this particular case. There was a list price outside of one or two years?

A. Yes.

Q. You had to increase your volume of business by selling more goods at ten per cent off?

A. My answer to that is this, if we sold at anything less than ten and ten and one, we should have lost money.

Q. And because you sold in competition, didn't you increase your volume of business up to \$2,000 a month instead of \$2,000 a year by selling at this higher discount?

B. By selling at competition prices.

Q. And your competition price was ten per cent off?

A. Yes.

628 Q. At that time.

A. Yes.

Q. Do you know what was the maximum discount suggested by the jobbers' association?

A. Why, I believe it was seven per cent at one time.

Q. And at another time how much?

A. I believe seven and a half for cigarettes.

Q. I presume the dealers, in talking with them, informed you that they observed this discount, didn't they?

A. Well, some of them did and some of them didn't.

Q. And the majority of them didn't, is that your experience?

A. Yes.

Q. In other words, if the majority of the jobbers, members of the association, had observed a discount of seven and eight per cent, you could have sold your goods at the same rate of discount?

A. Yes.

Q. To compete with them?

A. Yes, sir.

Q. And it was because the majority of the jobbers paid no attention to the rules of the association, you sold at these prices?

A. Yes, sir.

Q. So far as the association was concerned, during the year it existed, it practically amounted to nothing in the way of regulating prices in Philadelphia; is that true?

A. Yes, sir.

Q. It is true?

A. Yes.

Q. And it has gone out of business over a year ago, has it?

A. I don't know.

Q. Have you heard anything of it since January, 1922?

A. I haven't.

629 Q. And your experience of the association is, that it was merely in name, so far as its practical working was concerned; is that right?

A. Well, I knew there was an association.

Q. You knew there was an association?

A. Yes; I know there was an organization.

Q. But so far as its practical working was concerned, did it affect your business?

A. I don't know anything about their work.

Q. Would you say that you found in your experience that most of the jobbers belonging to the association were selling their goods at ten per cent off?

A. Yes, sir.

Q. And you had to do the same thing?

A. Yes.

Q. And if the members of the association had observed what they talked about, seven or eight per cent off, could you have competed with them and made a profit?

A. Yes, sir.

Q. And because they didn't observe that rule, you sold at ten per cent and made less money?

A. Yes, sir.

Q. With reference to these papers which Mr. Smith showed you, are you able to tell us whether that is a copy of the report or not?

Mr. SMITH. What difference does it make?

Mr. TAULANE. How can the witness refresh his memory from something that purports to be a report of an interview? I don't think that is the proper thing to do.

630 By Mr. TAULANE:

Q. Mr. Seider, have you any recollection to-day of anything you told Mr. Cowie except what you now read in that paper?

A. I possibly could, if I took a little time.

Q. But if you saw this statement in that paper and read it now, and Mr. Smith told you it is a copy of Mr. Cowie's report, would you say that you said that to Mr. Cowie or not?

A. Yes.

Q. Why—simply because it is in that paper, or because you recollect it?

A. Because what is on that paper, I told Mr. Cowie.

Q. Do you now remember it simply because you saw it on that paper?

A. Some things I saw I can't recollect.

Q. Can you recall the part there that refers to the conversation you had with Mr. Cowie as to what you told Mr. Eberbach?

A. No more than I told him Mr. Eberbach was to see me.

Q. Have you at this time any personal recollection, apart from the words in that paper, that you told Mr. Cowie that Mr. Eberbach said to you in one part of this interview, that Mr. Eberbach wanted you to maintain the association prices?

A. Yes, I recall telling Mr. Cowie that.

Q. What's that?

A. I recall that.

Q. Did you say that Mr. Eberbach said that to you?

A. That is what I was talking to Mr. Cowie about.

631 Q. You say you recall telling that to Mr. Cowie?

A. Yes.

Q. Or did Mr. Cowie tell you that Mr. Eberbach said that?

A. No.

Q. Isn't it the fact that there are some things in this paper that Mr. Cowie told you?

A. No, sir.

Q. And that Mr. Cowie put the question to you, prompted you, and then wrote it down?

A. I don't recollect whether Mr. Cowie prompted me or what he done.

Q. Didn't he prompt you a good deal—weren't you and Mr. Cowie quite talkative, didn't you talk at some length at that time, asking you questions and you asking him questions, and didn't you talk until you covered two or three sheets of paper instead of one and a half?

A. No, sir.

Q. What is your answer?

A. No, sir; our talk was very short.

Q. You asked him questions, didn't you?

A. Asked him why he was there.

Q. Any other question?

A. Not that I recall.

Q. Do you recall [referring to paper] that you thought the jobbers did a wise thing in trying to regulate the prices?

A. No; I don't recall that.

Q. Did you tell him that?

A. I don't recall that; don't recall telling him that.

Q. Did you notice it in this paper?

A. No; I didn't notice it. If I look it over—if you let me see it.

Q. I don't want you to look at it. Do you remember it?

A. No.

Q. I ask you whether or not you recall now that you said Mr. Eberbach told you that, or whether Mr. Cowie didn't tell you that Mr. Eberbach had said it?

A. What I said to Mr. Cowie, Mr. Eberbach told me.

Q. Told you what?

A. Asked if we would not join the association.

Q. Did you say anything else?

A. Asked me what prices the association were holding out for.

Q. What else?

A. I said seven per cent.

Q. What else did you say?

A. He asked—I don't know whether he asked me anything else.

Q. Isn't it the fact that he didn't ask anything else?

A. I don't recall whether he did or not.

Q. At this time you have no recollection whether there was anything else said, so far as Mr. Eberbach was concerned.

A. No more, except what I told you.

Q. You have told us all you recollect now; is that the fact?

A. I don't recall anything else that he asked me.

By Mr. WALSH:

Q. When was this interview with Mr. Cowie?

A. It was during the time we weren't receiving any merchandise; I can't just tell you the date.

633 Q. You asked Mr. Cowie on that occasion what his visit had to do with reference to the situation in the tobacco trade?

A. Yes.

Q. And didn't he ask you about your relations with the association and why you didn't join?

A. I simply told him about Mr. Eberbach's suggestion and that is what I gave there.

Q. Have you given the entire facts as to what occurred at that time?

A. Well, some I can't recall.

Q. At that time you said nothing to Mr. Cowie about Mr. O'Boyle being there in January, did you?

A. I don't think I did. I call him the American Tobacco Company's representative.

Q. You didn't tell that to Mr. Cowie?

A. I don't believe I did.

Q. Are you sure?

A. I am pretty sure.

Q. Did you read this report of Mr. Cowie that Mr. Smith handed to you?

A. Yes.

Q. There is nothing in the report of Mr. Cowie about any conversation which you and your father had with Mr. O'Boyle in January, 1921?

Mr. SMITH. I object. There is nothing to indicate that these two papers are the only report of Mr. Cowie.

Mr. WALSH. The witness has the right to look at the paper if he wants to refresh his recollection.

The EXAMINER. Yes.

Mr. WALSH. He says he has read it.

634 Mr. SMITH. There is nothing in the direct examination about this.

Mr. WALSH. If there is another report, let Mr. Smith produce it.

By Mr. WALSH:

Q. I ask you to look at this report of the interview you had with Mr. Cowie, representing the Federal Trade Commission, and to say if there is anything there relative to what Mr. O'Boyle said to you in January, 1921. [Witness shown paper.]

A. I don't see anything there.

By Mr. TAULANE:

Q. It simply states the substance of your interview, doesn't it?

A. Yes.

Q. I notice the statement in here, that Mr. Cowie makes, that you expressed the opinion—

Mr. SMITH. I object.

Mr. WALSH. The paper was handed to the witness to refresh his recollection and we want to find out what his recollection is in reference to it.

By Mr. TAULANE:

Q. Didn't you express the opinion that the jobbers were right in their position?

685 Mr. SMITH. Objected to.

The EXAMINER. In cross-examination counsel can ask that question.

(Objection overruled.

Exception.)

By Mr. TAULANE:

Q. Did you make that statement?

A. I will have to ask to look at the paper again.

Q. Didn't you read the paper?

A. It is there.

By Mr. WALSH:

Q. Didn't you say in that interview with Mr. Cowie—didn't you express the opinion that the jobbers were right in their position? (Objected to.)

Mr. WALSH. These papers were handed to the witness to refresh his recollection, and this is a mere technical objection. In attempting to get the facts, counsel for the Government interposes a technical objection in order to withhold from us certain facts. What does it mean? We want to find out what the truth is.

Mr. SMITH. There is no attempt at all to withhold any of the facts. It is surprising to me that counsel on the other side should suggest any objection to any technical objection, for they have
686 raised all the technical objections that have been raised during the progress of this hearing.

Mr. WALSH. This cross-examination is merely for the purpose of testing the recollection of the witness as to what he told Mr. Cowie or what he told Mr. Eberbach.

Mr. SMITH. The witness was not shown the entire paper. He was only shown part of it, which had absolutely nothing to do with what he told Mr. Cowie as to what Mr. Eberbach had said. He was only shown a section of the report, which was only referred to in direct examination.

Mr. WALSH. I don't think that makes any difference. The witness was handed the entire paper.

The EXAMINER. The witness was handed the entire paper and read it. If anything else occurred there, or is alleged to have occurred at this interview, I think counsel has the right in cross-examination to test his memory, especially if it refers to this matter.

(Objection overruled.

Exception.)

By Mr. WALSH:

Q. I ask you this, Mr. Seider, in the interview you had with Mr. Cowie, did you express the opinion that the jobbers were right in their position?

637 A. I don't recall saying that to him, but it seems to me that after that there was a little conversation after we had talked about the matter.

Q. Then it was an after conversation—you did tell him the jobbers were right?

A. Yes.

Q. Just what did you mean by that?

A. I meant to say they were right, but I didn't think they were organized properly; there were some upholding the prices and some were not.

Q. Did you in that conversation also say that you thought the jobbers were to blame—the retail jobbers were to blame for the situation that existed?

A. I don't recall; I might have; I don't remember.

Q. What do you say now?

A. It is possible as to what existed then.

Q. Did you tell him that conditions were bad in the tobacco business in Philadelphia?

A. I believe I did.

Q. And that the retail dealers were to blame for it?

A. I don't recall telling him that.

Mr. SMITH. What difference does it make?

By Mr. SMITH:

Q. Mr. Seider, when I gave you these two papers in my hand this morning and asked you to refer to Mr. Cowie's report to refresh your recollection, did I give you one sheet or two sheets?

A. I think you gave me two.

Q. Did you read all of the report or only part of it?

A. I read the part where you pointed out to me.

638 Q. Was that the only part you read?

A. I might have read up to this sheet, but I didn't read this paragraph [indicating on papers].

Q. Did Mr. Cowie interview you more than once?

A. Yes, sir.

Q. In September, 19

A. Yes, sir.

Q. So far as you know, there may be another report which Mr. Cowie made to the commission as to the other interview?

A. Yes.

By Mr. WALSH:

Q. You read all of that paper, did you?

A. No, I didn't say I read all of it.

Q. You say you read all but the last paragraph.

A. I may have glanced over it. I was only interested in the paragraph that was pointed out to me.

VICTOR FERMANI was thereupon called as a witness, and, being sworn, testified as follows:

Direct examination by Mr. SMITH:

Q. What is your name?

A. Victor Fermani.

Q. Where do you live?

A. 5144 Market Street.

Q. Philadelphia?

A. Yes, sir.

Q. What is your business?

A. Tobacco and cigar jobber.

Q. You are a dealer, retail and wholesale, both?

A. Yes, sir; retail and wholesale.

Q. Do you buy from the American Tobacco Company, direct?

A. Yes.

Q. And sell their products to the retail dealers?

A. Yes, sir.

Q. Do you buy from the Lorillard Tobacco Company, direct?

A. Yes, sir.

Q. And sell to the retail tobacco dealers?

A. Yes, sir.

Q. How long have you been buying of the American Tobacco Company direct?

A. Long ago—I think since about '90. Twenty, twenty-five, or thirty years. About '90 or '91, something like that.

Q. You were a member of the Philadelphia Tobacco Jobbers Association, were you not?

A. Yes, sir.

Q. Did you join when it was organized?

A. Yes, sir, I joined, but I will not go to every meeting.

Q. You joined it in the beginning?

A. I was not at the meetings, because I got my wife home; I can't leave home.

Q. Did you sell your goods over in Camden?

A. I sold it all over.

Q. All over the United States?

A. Sure.

Q. Did you have salesmen travelling all over the country?

A. I have friends; I have salesmen friends. I ship goods to Melbourne and I get orders from friends and I pay for the express anywhere.

Q. Do you sell goods over in Camden?

A. Some.

640 Q. Do you deliver orders there?

A. Some people come up themselves.

Q. Do you have salesmen going over there?

A. No.

Q. Have you delivered orders over in Camden?

A. Not myself. I have contracts engaged, not in Camden. Some people come themselves, some Italians come themselves. I don't deliver goods in Camden.

Q. Do you sell to some Italians over in Camden?

A. Some Italians come themselves; I don't go there myself to sell goods.

Q. Don't you go over to Camden to sell goods?

A. No, not me, not myself.

Q. And you have no salesmen over there?

A. No.

Q. You only sell to those who come over to your store in Philadelphia?

A. Yes, sir.

Q. You just accommodate them as a kind of friendly proposition?

A. Sure.

Q. Just friends?

A. Sure, that's what I make my living by, my friends.

Q. You don't have any contracts over in Camden?

A. No; in Philadelphia.

Q. How much do you buy from the Lorillard Tobacco Company in a year?

A. Goods?

Q. Yes.

A. I can't tell exactly, let me see—no, I can't tell exactly. Why, just a couple of thousand dollars a month, I think, more or less; I can't tell you.

Q. How much do you buy from the American Tobacco Company?

641 A. Maybe about the same—a little less than I buy from the Lorillard Company, because the Lorillard sells more smoking tobacco. I believe the Lorillard makes more smoking tobacco, not much.

Q. How much do you order?

A. From the Lorillard?

Q. From all the tobacco companies you deal with?

A. Well, I can't tell you that.

Q. About \$9,000 worth?

A. I buy \$15,000, \$20,000 a year.

Q. A year?

A. I can't tell you sure; I don't want to say anything unless I can say sure.

Q. Is that from the Lorillard and American Tobacco Companies only?

A. Yes.

Q. What other companies do you buy direct from?

A. Elliner, Dugansal, Lees. [Names spelled as pronounced.]

Q. Now, before the association was formed what discount were you giving?

A. Well, I don't know what discount; I gives them good discount.

Q. Before the association came into existence what was your price?

A. The association want to make prices; I sell my goods at my own price.

Q. I am asking you what that price was before the association was organized?

A. I sell goods at the same prices as I done before.

Q. What was that?

A. I give them five and seven and eight, according to the kind of people. Some customers I gives more, some customers six, some nine.

Q. Some friends of yours?

A. Yes. I figure my own expenses and I sell goods as best I can.

642 Q. You have given as high as nine off?

A. Well, some for nine, all right.

Q. Did you ever given ten off?

A. Some eight, five.

Q. I am speaking now about ten off—did you ever give ten off?

A. No; well some I give ten off. If it is cash, ten per cent, all right. I like to sell a thousand; well, all right, I give ten per cent.

Q. If you sell a thousand at ten off, you can make a living?

A. Yes; I work for a living. As long as I make a living I am satisfied.

Q. If you sell \$1,000 worth you can make a living?

A. Yes; I like to do that every time.

Q. How is business?

A. What do you mean?

Q. How is business; making any money?

A. Money, we can't make any money. If we make money, we go to jail.

Q. Then you are not making any money?

A. No; I make a living I say.

Q. Did you ever give eleven off?

A. Eleven?

Q. Yes.

A. No.

Q. Did you ever give ten and one to any of your friends?

A. I give ten and one.

Q. How much have you paid?

A. Ten and one, ten and two, ten and two.

Q. You buy at ten and two?

A. Yes.

Q. Do you sell at ten and one?

A. I tell you before I work for a living. You want to make me say lie. I buy for ten and two.

The EXAMINER. Answer the question.

Q. Did you ever give any of your friends ten and one off?

A. No; ten. I give no more.

643 Q. When the association was going on, what did you give then?

A. Five, seven, all this before the association.

Q. While the association was going on I mean?

A. When the association was going on—the same prices as before.

Q. How much was that?

A. Five, six, seven sometimes. I give the prices and make customers.

Q. Why didn't you live up to your agreement with the association?

A. Agreement of the association?

Q. Yes.

A. No—what agreement of the association, I don't know.

Q. Don't you know the association agreed to sell at eight per cent off, not any better?

A. I can't do that. I have no time to attend the meetings—I have no objection at all.

Q. Did any jockey ever tell you that you were not to sell at any better than seven or eight per cent off?

A. I never heard that; I never remember that.

Q. You signed the constitution.

A. (No answer.)

Mr. WALSH. What constitution?

Q. You signed the constitution of the association, didn't you?

A. I don't remember; not sure of that.

(No cross-examination.)

Commission adjourns till Friday, October 27th, 1922, at 9.30.)

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Docket 886

PHILADELPHIA, October 27, 1922.

Met pursuant to adjournment, 9.45 a. m.

Before George McCorkle, examiner.

Appearances: Mr. E. L. Smith for the commission; Mr. John Walsh for the American Tobacco Company; Mr. Charles Caldwell for the Lorillard Company; Mr. Joseph H. Taulane for the Wholesale Tobacco and Cigar Dealers Association of Philadelphia.

HERMAN J. KRULL was thereupon called as a witness, and, having been duly sworn, testified as follows:

Direct examination by Mr. SMITH:

Q. Where do you live?

A. Merion, Pennsylvania.

Q. That is a suburb of Philadelphia, is it not?

A. Yes, sir.

Q. What is your business?

A. Wholesale tobacco, cigars, cigarettes, smokers' articles.

645 Q. What is the name of your firm?

A. Charles A. Krull.

Q. Who is the owner of the business?

A. It is sort of a partnership arrangement.

Q. Who are the partners?

A. Charles A. Krull and myself.

Q. Charles A. Krull is your father?

A. Yes, sir.

Q. You are a member of the association?

A. Yes, sir.

Q. You are one of the officers?

A. Yes.

Q. What office did you hold?

A. Treasurer.

Q. I think you were treasurer from the time of the organization up until the first of January, 1922?

A. Yes, sir.

Q. Mr. Eberbach was president of the association during all the period you were treasurer?

A. Yes.

Q. Did you go to New York during the period the association was in existence with any other Philadelphia jobber?

A. No; with no other jobber, with the exception of Mr. Eberbach.

Q. When were you there with Mr. Eberbach?

A. I could not recall the date; in the early part of the year, I believe.

Q. Was it not on the first March, 1921?

A. I could not give you any idea on dates.

Q. But it was in 1921, last year?

A. Yes.

Q. How did it happen that you and Mr. Eberbach went to New York; was it by action of the association?

A. No.

Q. Were you on the executive committee?

A. Yes.

646 Q. Mr. Eberbach was on the executive committee also, I understand.

A. Yes.

Q. What tobacco manufacturers did you see in New York?

A. The American Tobacco Company and P. Lorillard.

Q. Who of the American Tobacco Company did you see?

A. On one occasion Mr. Beville.

Q. You say on one occasion; was there more than one occasion that you went to New York?

A. Two that I recall.

Q. One, you say, was about March, 1921?

A. I do not recall the date.

Q. But both of these were during the existence of the association?

A. Yes.

Q. What was the date of the other visit that you and Mr. Eberbach made to New York?

A. I could not recall dates.

Q. Who did you see on this other occasion of the American Tobacco Company?

A. I believe we stopped in to see Mr. Hill.

Q. Was the trip you and Mr. Eberbach made to New York when you saw Mr. Hill before or after the trip you made to New York when you saw Mr. Beville?

A. I could not recall that.

Q. Now, were there any trips that you and Mr. Eberbach took to New York outside of these two when you saw officials of the American Tobacco Company?

A. Not that I know of.

Q. Did you and Mr. Eberbach visit the Lorillard Company more than once during the existence of the association?

A. I do not recall any more than once.

647 Q. But you did go once?

A. Yes.

Q. Who of the Lorillard Company did you see on this occasion?

A. We saw Mr. Ball and I believe that I was in the cigar department on the same visit.

Q. That is, you saw Mr. Ball in one department and somebody else of another department?

A. I went into the cigar department on that visit.

Q. Was the trip that you and Mr. Eberbach took to New York when you saw Mr. Ball, both of you saw Mr. Ball, and when you went into the cigar department; was that the same trip that you took when you visited the American Tobacco Company?

A. No.

Q. So that you made three trips, three different trips to New York, you and Mr. Eberbach?

A. Two trips that I know of.

Q. On the occasion when you visited the Lorillard Company with Mr. Eberbach, did you on that same trip see anybody of the American Tobacco Company?

A. I do not think we did.

Q. Well, then, you made three trips to New York, you and Mr. Eberbach?

A. No; on one trip I recall the only person we saw was Mr. Bevill.

Q. On the other trip?

A. On the other trip I do not think that we saw anybody of the American Tobacco Company.

Q. Well, you said you took another trip to New York when you saw Mr. Hill? Don't you remember saying that?

A. Yes.

Q. Did you see the Lorillard Company on the same trip that you saw Mr. Hill?

648 A. It may have been; I cannot recall dates; that is too far back.

Q. Who was Mr. Bevill, of the American Tobacco Company, that you and Mr. Eberbach talked to in New York?

A. I understand he is sales manager.

Q. He is here in the room this morning, is he not?

A. Yes.

Q. Were you here last week?

A. One day, yes.

Q. Were you here the day Mr. Bevill testified?

A. No.

Q. What is the first name of the Mr. Hill of the American Tobacco Company you and Mr. Eberbach talked to in New York?

A. Percival Hill.

Q. Did you ever see Mr. George Hill in New York?

A. I do not recall that.

Q. Did you have an appointment with Mr. Hill when you and Mr. Eberbach went to New York to see him?

A. No.

Q. Did you tell anybody connected with the American Tobacco Company in any capacity that you were going to New York to see Mr. Hill?

A. No.

Q. Do you know whether Mr. Eberbach told any one?

A. I could not answer that.

Q. Did Mr. Eberbach ever say to you that he had told anybody of the American Tobacco Company?

A. No.

Q. Did I understand you to say that you cannot tell us whether your trip to see Mr. Hill was made before or after the trip you
649 made when you saw Mr. Bevill?

A. I could not recall that.

Q. But both trips were during the existence of the association?

A. Yes.

Q. And the trip to the Lorillard Company was during the existence of the association?

A. Yes.

Q. Did you report to your associates on the executive committee that you had been to New York?

A. I do not think we did.

Q. Did you report to any one connected with the tobacco business in Philadelphia that you had been to New York?

A. I do not think we did.

Q. Did Mr. Eberbach?

A. I could not answer that.

Q. Did you ever report to the association that you had made a trip to New York with Mr. Eberbach?

A. That I don't recall.

Q. You won't say, however, that you did not report to the association?

A. No.

Q. Did Mr. Eberbach report to the association that he and you, or each of you, had visited New York?

A. I do not recall that he did.

Q. You won't say that he did not?

A. No.

Q. When you made the trip to New York and saw Mr. Beville, did you see him in the morning or afternoon?

A. Afternoon, I believe.

Q. Did you have an appointment with him?

A. No.

Q. Did Mr. Eberbach?

A. I could not answer that.

650 Q. Did Mr. Eberbach ever say that he did?

A. No.

Q. When the association passed the resolution fixing the discount at 8 per cent, did your firm abide by the resolution?

A. For a short time, yes.

Q. How long?

A. Probably three or four months.

Q. When the association passed the resolution changing the discount from 8 to 7 per cent, did your firm abide by the resolution?

A. Changing from 8 to 7 per cent. That is very near the same thing, isn't it? We lived up to it for a short time.

Q. That is, you lived up to the 8 per cent for a short time and the 7 per cent for a short time?

A. Yes.

Q. How short a time did you live up to the 8 per cent?

A. Four months.

Q. How short a time did you live up to the 7 per cent?

A. Same time; prices were made at the same time.

Q. You mean during the same time?

A. About the same time.

Q. Who is Mr. Percival Hill, of the American Tobacco Company, that you and Mr. Eberbach saw in New York?

A. I believe president of the company.

Q. And who is Mr. Ball, of the Lorillard Company, that you and Mr. Eberbach saw in New York?

A. I believe vice president.

Q. What did you and Mr. Eberbach tell Mr. Bevill?

651 A. We went over to discuss a certain deal which they had on at the time in which they allowed a certain gratis on the sales of cigars and in the circular specified that no gratis would be allowed sub-jobbers.

Q. What was the deal?

A. Well, it is pretty far back; I do not recall just what the question was; I know it was the gratis on cigars.

Q. You and Mr. Eberbach discussed with Mr. Bevill this deal?

A. Yes.

Q. What was the nature of the discussion you had with Mr. Bevill?

A. Well, we had sent in a number of reports in which we had given this gratis on every sale we made regardless of who to.

Q. Regardless of whether he was a retailer or a sub-jobber?

A. Whatever you may call him.

Q. When you use "we," do you mean your firm?

A. We as a firm, and I think at a later date it came up that on certain reports that we sent in the gratis was not to be allowed.

Q. And you say the reports we sent it; you mean the firm?

A. Yes.

Q. And you discussed that with Mr. Bevill?

A. That is what we discussed that trip.

Q. Had you allowed the deal to all of your customers?

A. Yes.

Q. Whether sub-jobbers or not sub-jobbers?

A. Yes.

Q. The deal you speak of, was it of benefit to the purchaser, or a special benefit to the purchaser during that period?

A. It was a deal for a certain period to the advantage of the dealer purchasing the goods.

652 Q. Your term "deal" is well known to you, but will you explain to us what you mean by the term "deal"?

A. We consider a deal anything in the way of gratis or extra concession for the purchase of a certain number of goods.

Q. Let me see if I can summarize the thing: By deal did you mean substantially this, that if a retailer purchases during a certain limited period a certain quantity of goods made by a particular manufacturer, he gets an additional quantity over that period?

A. Well, he is not always—

Q. That is what you mean by the term deal—that if the purchase is made during a period and with certain quantities the retailer gets an additional quantity as a gift or premium, whatever you might call it?

A. Yes.

Q. What did Mr. Bevill tell you about those reports you sent in?

A. Well, if I remember right, I think that matter was to be taken up and we were to be notified just what was going to happen.

Q. Were you notified?

A. I think it was adjusted; yes.

Q. How was it adjusted?

A. I think they allowed us free goods to cover all sales we made.

Q. Those free sales that you allowed the purchaser, were those given free by you and the expenses borne by you and your firm, or was it borne by the manufacturer?

A. For the time being the gratis was given away by our firm and we were reimbursed at a later date.

653 Q. By arrangement with the manufacturer?

A. Yes.

Q. And all those deals, or all deals, using the word in the connection that you have used it, the expense—that is, as far as the expense is concerned—is borne by the manufacturer?

A. Yes.

Q. What did Mr. Eberbach discuss with Mr. Bevill on this occasion?

A. Along the same lines.

Q. What else did you and Mr. Eberbach discuss with Mr. Bevill on this occasion?

A. That I do not recall.

Q. Don't you recall that you spoke to Mr. Bevill about association matters?

A. No; I do not.

Q. You won't say, however, that you did not?

A. No; I wouldn't.

Q. What, if anything, did Mr. Bevill say about the association?

A. I don't recall him saying anything.

Q. At the time this deal was on with the American Tobacco Company was there a deal on by the Lorillard Company?

A. I do not recall that.

Q. At the time you and Mr. Eberbach visited Mr. Hill was there a deal on in the American Tobacco Company's products?

A. That I could not answer.

Q. You won't say, however, that there was not a deal on?

A. I could not answer.

Q. What did you and Mr. Eberbach and Mr. Hill talk
654 about on this trip to the American Tobacco Company?

A. Why, nothing in particular outside of general trade conditions.

Q. What were the general trade conditions that you and Mr. Eberbach discussed with Mr. Hill?

A. Well, nothing more than the different discounts allowed by the jobbers, etc.

Q. At the time—that is, on the occasion of your trip to New York when you saw Mr. Hill—there was in effect a resolution by the association on discounts, was there not?

A. Yes.

Q. Did you tell Mr. Hill about the discounts fixed by the association?

A. That I do not recall.

Q. Did Mr. Eberbach tell him?

A. I do not recall.

Q. Well, now, is this the only occasion when you ever saw Mr. Hill?

A. As far as I remember; that is, with Mr. Eberbach. It is customary for jobbers to drop in to one of those offices very often, and it is pretty hard to—

Q. That is the only occasion, however, when you went to the office of the American Tobacco Company to see its president with another jobber?

A. As far as I recall.

Q. Won't you please tell us what these general trade conditions were that you discussed with Mr. Hill?

A. It was nothing more than what I said before.

Q. Yes; but you haven't told us anything yet.

A. The different discounts allowed by the different jobbers.

Q. In Philadelphia?

A. Yes.

Q. What were the different discounts you told Mr. Hill were being allowed by the different jobbers in Philadelphia?

A. Well; it is pretty hard to specify any particular case; it was a general conversation.

Q. Who were the particular jobbers whose discounts in Philadelphia you and Mr. Eberbach discussed with Mr. Hill?

Mr. WALSH. I object to that. The witness—

(Objection overruled.

Exception.)

A. I do not think there were any particular jobbers mentioned.

Q. Did you mention Mr. Seider and the discounts he was allowing?

A. That I do not recall.

Q. Did Mr. Eberbach?

A. I do not recall.

Q. You won't say that you did not?

A. No.

Q. And you won't say that Mr. Eberbach did not?

A. No.

Q. Did you speak of the discounts that Murphy Brothers of Camden were allowing?

A. I do not recall.

Q. You won't say that you did not?

A. No.

Q. Did you speak of the discounts that Gordesky of Philadelphia was allowing?

A. I don't recall.

Q. You won't say that you did not, however?

A. No.

Q. Did you and Mr. Eberbach, or either of you discuss with Mr. Hill or speak to Mr. Hill about the discounts that Fermani of Philadelphia was allowing?

A. I do not recall.

Q. You won't say, however, that you did not, or that Mr. Eberbach did not?

A. No.

Q. Did you and Mr. Eberbach, or either of you, on this occasion, discuss with Mr. Hill the discounts that Blumenthal of Philadelphia was allowing?

A. I do not recall.

Q. You won't say, however, that you did not?

A. No; I do not recall talking on the subject at all.

Q. You won't say that Mr. Eberbach did not discuss with Mr. Hill the discounts that Blumenthal was allowing?

A. I do not recall.

Q. You won't say that he did not?

A. No.

Q. You have said that you are unable to recall the rate of discounts that different Philadelphia jobbers were giving, that is you can not remember telling Mr. Hill. Can you remember Mr. Eberbach telling Mr. Hill the rate of discounts that different Philadelphia jobbers were allowing?

A. I do not recall.

Q. And you say you can not recall which of the Philadelphia jobbers you discussed or that Mr. Eberbach discussed with Mr. Hill as to the discounts. Tell us what you do remember regarding this discussion with Mr. Hill on trade conditions in Philadelphia?

A. I do not remember any more than talking about the general conditions and the supposition, of nothing more than the supposition on the different discounts allowed.

Q. Tell us the supposition that you and Mr. Eberbach or either of you discussed with Mr. Hill?

A. On any particular case, do you mean?

Q. A particular case if you please and the question generally.

A. I do not recall specifically any particular case, or having heard of any.

Q. Do you remember discussing any particular jobber?

A. I do not recall that.

Q. Do you remember discussing any particular supposed discounts?

A. No.

Q. But you do remember, as you say discussing supposed discounts?

A. In a general discussion that would be likely to be talked on; yes, sir.

Q. And you think that you did discuss with Mr. Hill or that Mr. Eberbach discussed with Mr. Hill those matters?

A. I do not recall any specific cases.

Q. That is special cases or specific cases of what discounts the jobbers were allowing?

A. Yes.

Q. Did you discuss any supposed discounts?

A. Nothing more than in a general way.

Q. What were the supposed discounts that you discussed in a general way?

A. Nothing more than the supposition was that different jobbers were allowing different discounts.

Q. Can't you tell us a little more about what you said or what Mr. Eberbach said in that connection?

A. No; that is all I recall.

Q. What did Mr. Hill say?

A. That I do not recall.

Q. Don't you recall anything that Mr. Hill said?

A. No; that has been too far back.

658 Q. This is the only occasion during the period that you were a member of this association, on its executive committee and its treasurer, when you went to see Mr. Hill with another Philadelphia jobber who was president of the association, and you are unable to recall what Mr. Hill says. Do you want us to have that understanding of your testimony?

A. As far as I can recall, I could not repeat any of his conversation.

Q. I am not asking you to repeat his conversation; I am asking you to tell us what Mr. Hill said?

A. I do not recall.

Q. Don't you remember a thing Mr. Hill said?

A. No.

Q. Don't you remember that you asked Mr. Hill for the support of the American Tobacco Company in the activities of the association?

A. I certainly do not.

Q. You don't remember that. You won't say, however, that you did not ask Mr. Hill for his support?

A. No.

Q. Don't you recall that Mr. Eberbach asked Mr. Hill for the support of the American Tobacco Company in the activities of the association?

A. No; I do not recall.

Q. You won't say, however, that Mr. Eberbach did not ask Mr. Hill for the support of the American Tobacco Company?

A. No.

Q. Don't you recollect that Mr. Hill promised you or Mr. Eberbach, or both of you, the support of the American Tobacco Company in the activities of the association?

A. I do not recall that.

659 Q. You won't say, however, that Mr. Hill did not agree to assist the association in its activities?

A. No.

Q. Is there one thing, one single thing, that you do remember Mr. Hill told you on that occasion?

A. No; I could not repeat one single thing that he said.

Q. I am not asking you to repeat; I am asking you to tell us one single thing that Mr. Hill said to you or to Mr. Eberbach, or to both of you on this occasion in New York when you visited him.

A. No; I could not recall.

Q. How long were you in Mr. Hill's office on this occasion?

A. Not much over five minutes, if I recall right.

Q. You recall that you were not there more than five minutes?

A. I do not think it was much more than that.

Q. How much more than five minutes do you think it was?

A. I could not mention that exact time.

Q. Is that because you can not recall how long you were there?

A. No.

Q. Were you and Mr. Eberbach together all the time when this interview with Mr. Hill was had?

A. We were in the room at the same time; yes.

Q. You heard all Mr. Eberbach had to say, and you heard what Mr. Hill had to say?

A. Yes.

Q. You heard what Mr. Hill had to say to Mr. Eberbach, and what Mr. Hill had to say to you?

A. Yes.

Q. And you heard what Mr. Eberbach said to Mr. Hill?

A. Yes.

Q. And you can not tell us what took place at that interview?

A. Nothing more than a general discussion on trade conditions.

Q. What was the general discussion on trade conditions that you three gentlemen had on that occasion?

A. Nothing more, as I said before, than the general way in which the goods were sold.

Q. That is just what I am asking you to describe to us. Just describe the general condition that you and Mr. Eberbach and Mr. Hill discussed on this occasion in Mr. Hill's office in New York?

A. Well, it was nothing more than that we felt, believed that the goods were sold at different discounts, and, as far as I remember, general trade conditions and merchandise being sold at various prices by various jobbers.

Q. Did Mr. Hill ask you what these different discounts were and who the jobbers were that were selling at these different discounts?

A. I do not recall that he did.

Q. You won't say, however, that he did not?

A. No.

Q. During the period of the existence of the association, did you see Mr. Hill, Mr. Beville, or any other person in New York connected with the American Tobacco Company outside of these trips that you made with Mr. Eberbach?

A. I may have; I go over there pretty often.

Q. So that you think you may have seen officials of the
661 American Tobacco Company on occasions other than these
two occasions when you went with Mr. Eberbach?

A. I do not recall any particular instance, but it is possible.

Q. Do you remember who you saw in New York connected with the
American Tobacco Company during this period that the association
was in existence?

A. No; I do not recall.

Q. But I think you have said that you only have seen Mr. Hill
once, that was when you and Mr. Eberbach went there together?

A. As far as I can recall; yes.

Q. What else besides this deal you speak of did you and Mr. Eber-
bach or either of you, discuss with Mr. Bevill in New York when
you and Mr. Eberbach went over there to see him?

A. I do not think we discussed anything but the deal.

Q. You are quite sure of that, are you?

A. Pretty sure; yes.

Q. How often during the existence of the association did you,
yourself, unaccompanied by any other jobber, see Mr. Bevill in
New York?

A. I do not recall of any instance.

Q. But you are positive that you and Mr. Eberbach discussed
with Mr. Bevill when you saw him in New York only the deal which
you speak of?

A. Yes; as far as I can recall.

Q. Well, I think you said before that you were positive that
the only thing you and Mr. Eberbach discussed with Mr. Bevill was
the deal?

A. Relative to the tobacco business; yes.

Q. Well, by that do you mean that you had a discussion
662 regarding something else that was not in connection with the
tobacco business?

A. It is possible.

Q. Why is it that your recollection on the trip you and Mr. Eber-
bach took to New York when you saw Mr. Bevill is so much better
than your recollection of the interview you and Mr. Eberbach had
with Mr. Hill?

A. Well, that would be very likely. There was a certain deal
which had to be adjusted and we went over there for that sole
purpose, and having that deal adjusted, you could recall that very
freely.

Q. You mean by that there was not any deal that you discussed
with Mr. Hill?

A. No.

Q. I think you mean yes, don't you?

A. No; we did not discuss any.

Q. You have said that you saw at the offices of the Lorillard
Company a gentlemen by the name of Ball. That was when you and
Eberbach went there together?

A. Yes.

Q. That was during the period of the existence of the association?

A. Yes.

Q. Did you know Mr. Ball before this trip?

A. Yes.

Q. You had met him before?

A. Yes.

Q. Did you and Mr. Eberbach, or did you in company with any other Philadelphia jobber, ever see Mr. Ball in New York excepting on this occasion when you and Mr. Eberbach went there?

A. No.

Q. What did you and Mr. Eberbach discuss with Mr. Ball?

A. Nothing more than general trade conditions.

Q. What were those general trade conditions that you and
663 Mr. Eberbach discussed with Mr. Ball?

A. Nothing more than the different discounts, as I said before, sold by different jobbers.

Q. What were the different discounts that you and Mr. Eberbach discussed with Mr. Ball?

A. Well, I don't think there was any particular discounts mentioned.

Q. Who were the particular jobbers that you and Mr. Eberbach discussed with Mr. Ball?

A. I do not recall mentioning any particular jobber.

Q. These discounts which you speak of as having been discussed by you and Mr. Eberbach, or either of you, with Mr. Hill, were Philadelphia discounts and Camden discounts?

A. Yes, Philadelphia discounts.

Q. These discounts which you spoke of as having been discussed by you and Mr. Eberbach or either of you, with Mr. Ball, were also Philadelphia discounts?

A. Yes.

Q. And Camden discounts?

A. Yes.

Q. Can you tell us when this trip was that you made to the office of the Lorillard Company when you saw Mr. Ball?

A. I cannot recall any date; no.

Q. Was it in 1920 or 1921?

A. I believe in 1921.

Q. Do you remember receiving a circular letter from the American Tobacco Company issued to its jobbing customers?

A. I think we received such a circular.

Q. I show you this paper, which is known as commission's Exhibit No. 10 in this case. You received that circular also, did you not?

A. I believe we did.

664 Q. Was your trip to New York when you and Mr. Eberbach saw Mr. Hill before or after you received the American Tobacco Company's circular No. 2743 known as commission's Exhibit No. 10?

A. I believe it was before that date.

Q. Did you receive circular No. 1369 from the Lorillard Company, a copy of which is in evidence and is known as commission's Exhibit No. 11?

A. I believe we received that circular, but I have never found a copy of it.

Q. Do you remember receiving an earlier circular from the Lorillard Company known as circular No. 1350?

A. I could not recall the circular by number.

Q. Do you remember that there was a circular issued by the Lorillard Company in May, 1921?

A. I could not recall that.

Q. When you and Mr. Eberbach visited Mr. Bevill in New York as you have testified, were you acting for yourself and Mr. Eberbach alone, or were you both, you and Mr. Eberbach, or either of you, acting for the other Philadelphia jobbers?

A. We were acting for ourselves.

Q. Was the adjustment made by the American Tobacco Company as the result of your visit to New York when you saw Mr. Bevill put into effect with the tobacco trade in Philadelphia generally, or was that adjustment made only with your firm and with Mr. Eberbach's firm?

A. As far as I know, it was put in generally.

Q. How did you and Mr. Eberbach happen to go to New York to see Mr. Hill?

665 A. Well, it happens that Mr. Eberbach and I are within a few doors of each other in business, and it would be likely if I may be going to New York to say something to him about it and he would go along.

Q. Who suggested this trip to New York; you or Mr. Eberbach?

A. I do not recall that.

Q. How did it happen that you and Mr. Eberbach went on another occasion to the Lorillard Company when you saw Mr. Ball and discussed general trade conditions and discounts?

A. About the same way I suppose. I do not recall just how it came about.

Q. You do not remember who suggested the trip?

A. No.

Q. Did you see Mr. Ball, of the Lorillard Company, in the forenoon or afternoon?

A. I do not recall the time.

Q. How long an interview did you have with Mr. Ball?

A. I could not recall the time on that.

Q. Mr. Krull, I have asked you a series of questions, or a lot of questions regarding the interview you and Mr. Eberbach had with Mr. Hill. Do you remember my asking you a lot of questions in that connection?

A. Yes.

Q. And you remember that you gave answers to the questions which I asked?

A. Yes.

Q. If I asked you concerning the interview you and Mr. Eberbach had with Mr. Ball the same questions that I asked you regarding your interview and Mr. Eberbach's interview with Mr. Hill, would your answers be the same as you gave to the questions I asked
666 you regarding the interview you and Mr. Eberbach had with Mr. Hill?

MR. CALDWELL. I object to that question as being highly improper, as tending to crowd many questions into one question, and I object on the ground that it is incompetent, irrelevant, and immaterial. (Objection overruled.)

(Exception.)

A. That was a pretty long question. If you were to ask me about the same things about the interview with Mr. Ball, I believe I would answer them the same way.

MR. CALDWELL. I move to strike out that on the same ground.

EXAMINER MCCORMIE. He has answered it.

MR. CALDWELL. I now move to strike out the testimony on the same ground to which I objected to the question as being improper direct examination, incompetent, irrelevant, and immaterial.

(Objection overruled.)

(Exception.)

Q. Do you remember anything discussed at this interview you and Mr. Eberbach had with Mr. Ball, of the Lorillard Company, excepting the things that you have related?

A. I do not recall anything else.

667 Q. I think I have asked you, but to be sure I will ask you again, whether on this day when you and Mr. Eberbach saw Mr. Ball of the Lorillard Company, you and Mr. Eberbach saw anybody of the American Tobacco Company in New York. Have I asked you that question before?

A. I believe you have.

Q. How did you answer it?

A. I do not think we did, I do not recall anyone else.

Q. Did you tell Mr. Hill that you were on the executive committee and treasurer of the Philadelphia association?

A. No.

Q. Did Mr. Eberbach say that he was the president of the association?

A. I do not recall that he did.

Q. Did you tell Mr. Hill that Mr. Eberbach was the president of the association?

A. No.

Q. Did Mr. Eberbach tell Mr. Hill that you were on the executive committee, treasurer, or a member of the association?

A. I do not recall.

Q. If I asked you the same question regarding the interview with Mr. Ball that I asked you regarding the interview with Mr. Hill, would your answers be the same?

A. Yes.

Q. How soon after your return from your trip to New York when you and Mr. Eberbach saw Mr. Hill was the next meeting of the association?

A. I could not recall the dates.

Q. The association met monthly, however?

A. Yes; once a month.

Q. I did not ask you as to the date, Mr. Krull; I asked you how soon after the trip you and Mr. Eberbach made to New York when you saw Mr. Hill was the next meeting of the association?

A. I could not recall.

Q. How long after your visit with Mr. Eberbach to Mr. Ball of the Lorillard Company was the next meeting of the association?

A. I could not recall dates.

Q. Did you discuss or tell any other Philadelphia jobber about your trip to New York with Mr. Eberbach when you both saw Mr. Hill?

A. I do not remember ever telling anybody.

Q. You won't say, however, that you did not?

A. No; I won't say.

Q. Did you tell any Philadelphia tobacco jobber about your interview and Mr. Eberbach's interview with Mr. Ball?

A. No; I do not remember.

Q. You won't say, however, that you did not?

A. No.

Q. Did you inform the secretary of your association that you and Mr. Eberbach had seen Mr. Hill of the American Tobacco Company in New York?

Mr. WALSH. I object. He has asked the same question but not in the same way. He has already testified he did not tell any member of the association he had been to New York, and he had no connection with the association activities.

Mr. SMITH, Mr. Examiner, the distinction is that Mr. Brogan, secretary of the association, is connected with the Dusek, Goodlow Company. He has testified to these discounts agreed upon by

the association and that is why I have asked this witness whether he informed Mr. Brogan, secretary of the association, of this trip.

(Objection overruled.

Exception.)

Examiner McCORKLE. Proceed with the question.

A. I do not remember ever telling Mr. Brogan anything about it.

Q. You won't say, however, that you did not inform Mr. Brogan?

A. No.

Q. Did you ever inform Mr. Brogan about the trip you and Mr. Eberbach made to New York when you saw Mr. Ball of the Lorillard Company?

A. I do not remember ever telling him anything.

Q. You won't say, however, that you did not?

A. No.

Q. Did you ever hear Mr. Eberbach tell anyone at any time, at any place, that he had been to New York or that you and he had been to New York, and that he and you, or either of you, had seen Mr. Hill of the American Tobacco Company?

A. I do not recall him ever doing so.

670 Q. You won't say, however, that he did not?

A. No.

Q. Did you ever hear Mr. Eberbach tell anyone at any time or place that he or you, or both of you, had seen Mr. Ball of the Lorillard Company?

A. I do not remember him ever mentioning that.

Q. You won't say, however, that he did not?

A. No.

Q. And you said that you did not?

A. Yes.

Q. Did you ever hear any Philadelphia jobber state at any time, or any place, that you and Mr. Eberbach, or either of you, had been to New York and had talked with Mr. Hill or with anybody connected with the American Tobacco Company?

A. I do not remember ever hearing any remarks.

Q. You won't say, however, that you did not?

A. No.

Q. Did you ever hear anyone at any time, or any place, say that you or Mr. Eberbach, or both of you, had seen Mr. Ball or anybody else connected with the Lorillard Company at the Lorillard Company's office in New York?

A. I do not recall ever hearing it.

Q. You won't say, however, that you did not hear it?

A. No.

Q. Did the executive committee of the association know that you and Mr. Eberbach had been to New York to see Mr. Hill?

A. I don't think they did.

Q. Did any members of the executive committee know that you and Mr. Eberbach, or either of you, had seen Mr. Hill in New York?

A. No; I don't believe they did.

Q. What do you say as to your visit to the Lorillard Company offices; would your answers be the same?

A. Yes.

Q. I notice that the front cover leaf of the constitution of
671 your association describes the title of the association as follows: "The Wholesale Tobacco and Cigar Dealers' Association of the District of Philadelphia." What does the word "district" mean in that expression?

A. I could not answer that, because I do not believe I ever read the constitution.

Q. Although you signed it?

A. I don't know what I signed.

Q. You know that you signed the constitution, however?

A. I signed something there.

Cross-examination by Mr. TAULANE:

Q. Mr. Krull, you have been subpoenaed, have you not?

A. Yes, sir.

Q. When did the association cease to function; was it at the end of 1921?

A. Why, I believe it was.

Q. During the life of the association, did the members observe the suggestion of the association about the maximum discount?

A. I don't think they did.

Q. Your concern did?

A. No.

Q. From your knowledge of the trade and the competition in the trade, you don't think any of them did?

A. I do not think they did.

Q. By that you mean that in many instances they allowed more than the maximum discount of eight or seven per cent, as the case might be?

A. Yes.

Q. This resolution of the association only fixed the maximum discount, did it not?

A. Yes.

672 Q. You did not sell all your goods at the maximum discount?

A. No.

Q. You sold much lower?

A. From two on.

Q. From two on. The purpose of the association was not to fix rigidly a price, but simply a maximum discount?

A. Yes.

Redirect examination by Mr. SMITH:

Q. Did you ever discuss association matters, discounts, or jobbers with anybody else in the American Tobacco Company except Mr. Hill?

A. I do not believe I did.

Q. Did you ever discuss those same matters with anybody of the Lorillard Company except Mr. Ball?

A. I do not recall.

Q. Did you ever, on any of these trips you made to the Lorillard Company during the period of the association, when you were there alone, discuss with anybody of the Lorillard Company, Philadelphia jobbers or Philadelphia discounts?

A. I do not believe I did.

Q. Did you ever discuss them in Philadelphia or at any other place with any representative of the Lorillard Company?

A. Not that I recall.

Q. Did you ever discuss such matters with any representatives of the American Tobacco Company at any other place?

A. I do not recall having done so.

673 THOMAS F. O'BOYLE, was thereupon called as a witness, and having been duly sworn, testified as follows:

Direct examination by Mr. SMITH:

Q. Mr. O'Boyle where do you live?

A. 4035 North Twelfth Street, Philadelphia.

Q. Do you mind telling us your age?

A. I am thirty years old.

Q. How long have you since lived at 4035 North Twelfth Street?

A. Since last June.

Q. How long have you lived in Philadelphia?

A. Since last December a year.

Q. You have been living in Philadelphia since December, 1920?

A. Yes, sir.

Q. Prior to that, where did you live?

A. Prior to that I lived in Cincinnati.

Q. How long did you live in Cincinnati?

A. Oh, about five months, I think.

Q. Prior to that, where did you live?

A. Louisville.

Q. How long did you live in Louisville?

A. About nine months, I think.

Q. Well, during this period you are speaking of, Cincinnati and Louisville, you were employed by the American Tobacco Company?

A. Yes.

Q. And traveled for that company?

A. I traveled for that company.

Q. Where was your family living in that period?

674 A. During the period I lived in Louisville I did not have any family, and after that they lived in Cincinnati.

Q. What is your present business?

A. Real estate.

Q. Were you ever connected with the American Tobacco Company?

A. Yes, sir.

Q. How long were you with the American Tobacco Company?

A. About eight years, I think.

Q. Prior to your connection with the American Tobacco Company, had you done other work?

A. No; I was in the tobacco business prior to my connection with the American Tobacco Company.

Q. In what way?

A. As a salesman.

Q. Where did you travel from?

A. Philadelphia.

Q. You were working with the company during college vacations?

A. I was with a small Kentucky house before I came with the American Tobacco Company.

Q. Prior to your connection with the small Kentucky house, what did you do?

A. I went to school.

Q. Where did you go to school?

A. Central High School of Philadelphia and Lehigh.

Q. Lehigh University at Bethlehem?

A. Yes, sir.

Q. Did you graduate from Lehigh?

A. No, sir.

Q. How long did you attend Lehigh?

A. Two years.

Q. When did you leave Lehigh?

A. In 1909, I think; 1910.

675 Q. Now, when did you first enter the employ of the American Tobacco Company?

A. I think my first employment with them was in 1911.

Q. And what was that?

A. That was as a salesman in Philadelphia.

Q. And did you continue in the employ of the American Tobacco Company until you went into the real estate business?

A. No, sir; I left and went with the Burley Tobacco Company of Kentucky.

Q. When did you go back then with the American Tobacco Company?

A. After I left the Burley Tobacco Company; that was in 1914 or 1915.

Q. Then you came with the American Tobacco Company?

A. Yes, sir.

Q. In what capacity?

A. Salesman.

Q. What was your territory?

A. Oh, at that time I worked in Philadelphia first, then I went to Indiana, from Indiana to Ohio, and from Ohio to Michigan, and from Michigan to Kentucky, and from Kentucky to Pennsylvania.

Q. As a salesman?

A. As a salesman; always in the selling organization.

Q. Now, did you have any other title except salesman at any time when you were with the organization?

A. Yes, sir; I was a salesman and I was a division manager.

Q. When did you become division manager?

A. I do not remember, Mr. Smith.

Q. Do you remember how long you were division manager, Mr. O'Boyle?

A. About two years, I think.

676 Q. What were your duties as division manager for the American Tobacco Company?

A. Well, I directed the efforts of four or five retail salesmen.

Q. You say you were division manager for about two years. At the expiration of those two years did you have any other title with the American Tobacco Company?

A. Yes, I was then made a field sales manager.

Q. And where was your office when you were field sales manager?

A. Well, we had an office in Cleveland, and I was transferred to Kentucky and from Kentucky to Pennsylvania.

Q. When you were field sales manager were you the only field sales manager of the American Tobacco Company, or did it have other men whom it called field sales managers?

A. It had other men.

Q. How many others did it have at the time you were field sales manager?

A. I think about twenty-five or thirty throughout the country.

Q. How long were you field sales manager?

A. About two years.

Q. After you were field sales manager, did you have any other title with the American Tobacco Company?

A. No.

Q. What were your duties as field sales manager?

A. Well, it was to employ, train, and direct the effort of salesmen.

Q. How many men were under your direction while you were field sales manager?

A. About twenty-five.

Q. Were you located part of the time in Philadelphia while you were field sales manager?

A. Yes, sir.

677 Q. A division manager is a position of higher rank than a salesman, I take it?

A. Yes.

Q. And field sales manager is a position of higher rank than the position of division manager?

A. Yes.

Q. How many field sales managers did the American Tobacco Company have at the time you were one of its field sales managers?

A. I think about twenty-five.

Q. Up to what time were you field sales manager for the American Tobacco Company?

A. Last October.

Q. You mean October, 1921?

A. Yes, October, 1921.

Q. Since that time you have not been connected with the American Tobacco Company at all?

A. No.

Q. Were the salesmen of the American Tobacco Company who sold to jobbers in Philadelphia under your direction while you were field sales manager?

A. Yes, sir.

Q. During what period of time were those salesmen who travelled the Philadelphia jobbing houses under your direction?

A. During what period of time?

Q. Yes. I asked you that because I thought you said as field manager you were located at different places, or maybe I am incorrect?

A. Well, I was. Do you mean during that period I had charge of the Philadelphia territory?

Q. That is it; from December, 1920, up to October, 1921.

A. Yes.

Q. The men who were selling for the American Tobacco Company, Philadelphia jobbers, were under your direction?

A. That is right.

Q. Now, were there any other duties you had as field sales manager excepting those you have described?

A. They were the principal duties.

Q. Was it also your duty to keep in touch with the jobbing trade?

A. Yes, sir.

Q. And conditions in the trade?

A. Yes, sir.

Q. With respect to the jobbers?

A. Yes.

Q. When you were located in Philadelphia as field sales manager of the American Tobacco Company did you know that there was an organization of jobbers?

A. Yes, sir.

Q. Where did you get that information?

A. Well, that was general trade gossip.

Q. Did you learn who the officers of the association were?

A. Some of them.

Q. And where did you get that information?

A. That also was general gossip.

Q. By "general gossip" do you mean gossip in the trade?

A. In a trade way.

Q. And by "trade" you mean jobbing trade and selling branches of the manufacturing companies?

A. Yes.

Q. Did you learn while you were field sales manager of the American Tobacco Company that there was a change of discounts allowed by jobbers in Philadelphia to the retail trade?

A. Yes, sir.

Q. Did you learn what that change was?

A. Yes, sir.

679 Q. How did you get that information?

A. Well, I got that from almost every jobber that I visited in the town.

Q. Did you become familiar with the sales made by the men who were working under you while you were field sales manager in Philadelphia?

A. The retail sales?

Q. No; the sales made by your company to the jobbers?

A. Yes, sir.

Q. And did you become familiar in a general way with the tobacco jobbing business in Philadelphia?

A. Yes, sir.

Q. What were the conditions in Philadelphia while you were field sales manager of the American Tobacco Company with respect to the frequency of orders obtained by the American Tobacco Company from its jobber customers?

A. The orders were very frequent.

Q. How were orders given to the American Tobacco Company by its jobber customers?

A. Well, at times they were sent in voluntarily.

Q. And solicited at times by salesmen?

A. Well, it was a rule that the division managers had to call on the jobbers at least once a month, and they solicited orders, of course.

Q. And did you obey the rule?

A. We did; yes, sir.

Q. State whether or not it was the policy of the American Tobacco Company to secure good standing orders from the jobbing trade in Philadelphia?

A. Yes; it was.

Q. Was it a standing order?

680 A. It is a specified amount of goods that are to be shipped regularly and automatically by the company to a jobber at regular intervals.

Q. Now, for what period of time on the average, would you say, those standing orders cover?

A. Oh, there wasn't any; there isn't any way to gauge; sometimes shipment once a week, and sometimes twice a month; not less, however, than once a month; that is, we would not take an order that could not be shipped once a month.

Q. Were these more frequent than once a month?

A. Yes.

Q. For what period of time did the order cover? You spoke of it as being a standing order, and I take it that means for a period of time, shipments to be made at intervals during that period.

A. That was governed entirely by the jobber. He could discontinue whenever he saw fit. He could stop two shipments and have other shipments go ahead.

Q. I am speaking not so much of that as I am trying to find out the period of time over which the standing order was spread. Did

you take standing orders that were as long as four or five months, shipments to be made weekly under that order?

A. Sometimes the orders run longer than that. We did not make any limit whereby—

Q. I understand that. I am trying to find out whether as a matter of fact there were standing orders given to the American Tobacco Company by its jobber customers in Philadelphia which covered periods of time such as five or six months, the goods to be shipped weekly or semiweekly or biweekly?

A. I would think so; I could not say definitely.

Q. What were the quickest selling items of the American Tobacco Company handled by its jobber customers in Philadelphia while you were a field sales manager?

A. Sweet Caporal cigarettes, Lucky Strike cigarettes, U. S. Marine smoking tobacco, Bull Durham, Tuxedo smoking tobacco; that's about all.

Q. Did you become familiar with the frequency in which the jobbing trade in Philadelphia received shipments of these different items or of some of them?

A. Yes, sir.

Q. State how often the jobbing trade in Philadelphia was shipped these different items you have named or some of them.

A. I can hardly answer that question. Every jobber in Philadelphia had a standing order on the fastest selling brands, and each individual jobber had them shipped at different intervals and different quantities. There is no way to answer that question.

Q. What did you find on the average was the frequency in which jobbers received from the American Tobacco Company the fastest selling items?

A. I could not answer that.

Q. Isn't it a fact that many of the jobbers in Philadelphia receive weekly shipments?

A. Yes; some of them receive weekly shipments.

Q. Isn't it true that that applies to the greater number of Philadelphia jobbers?

A. I could not say the greater number, no.

Q. Would you say that the Philadelphia jobbers receive every two weeks, or more frequently than that, new shipments or shipments from the American Tobacco Company?

A. I could not answer that.

Q. Didn't you become familiar while you were field sales manager of the American Tobacco Company in Philadelphia with the extent of time it took the jobbing trade to turn over its stock of its shipments?

A. Shipments of our products?

Q. Yes.

A. Yes; fairly so.

Q. How frequently did you find that the jobbing trade in Philadelphia turned over American Tobacco Company products?

A. That question is too broad, Mr. Smith. There were too many jobbers and they turned them over at different intervals.

Q. Will you answer the question as best you can?

A. I could not answer it.

Q. What did you find was the quickest turnover of any of the jobbers on your products in Philadelphia?

A. The quickest was Sweet Caporal cigarettes, I think.

Q. And how often did you find the Sweet Caporal cigarettes were turned by the jobbing trade, or is that question too broad?

A. It is too broad.

Q. What was the quickest that Sweet Caporal cigarettes were turned over by any one jobber in Philadelphia?

A. I do not remember; I could not tell you.

Q. Do you have any idea of the extent of time it took the Philadelphia jobber to turn over on the average American Tobacco Company products?

A. No, sir.

683 Q. But you do know that some of the jobbers receive weekly shipments of the fast selling items?

A. Yes, sir.

Q. On standing orders?

A. Yes, sir.

Q. And how many of the jobbers, or what percentage of the jobbers in Philadelphia would you say had standing orders with the American Tobacco Company for weekly shipments?

A. Nearly all of them had standing orders.

Q. Was it the policy of your company to obtain, if it could, standing orders?

A. Yes, sir.

Q. Was that because it helped your shipping department?

A. Yes, sir.

Q. Was there any other reason that your company had that policy?

A. Well, it was a matter of fresh goods to the consumer; it was just a protection for our merchandise and jobbers' stock.

Q. Quicker distribution from manufacturer to consumer?

A. Quicker turn over.

Q. And did your company aim to have the jobber sell his stock as rapidly as the jobber could so that it might reach the consumer in good condition?

A. Yes, sir.

Q. Did you become familiar with the policy of the American Tobacco Company regarding shipments into Philadelphia by jobbers who were not located in Philadelphia?

A. No.

Q. Did you know while you were field sales manager for the American Tobacco Company in Philadelphia that jobbers from remote points or from points outside of Philadelphia were shipping goods into the retail trade here in the city?

684 A. I did not know definitely; I understood that they were.

Mr. WALSH. I move to strike out the answer. He said he did not know definitely, he understood, which is not conclusive.

Examiner McCORKLE. Let him state just the source of his information.

By Mr. SMITH:

Q. What was the source of your information?

A. That was trade gossip.

Q. Did you get that from your salesmen?

A. No, sir.

Q. You got it on your own investigation?

A. I got that while I was just visiting the trade.

Q. Did you find that out also from the American Tobacco Company?

A. No, sir.

(Adjourned until 1:30 p. m. of this day.)

685

Docket 886

PHILADELPHIA, OCTOBER 27, 1922.

Met pursuant to adjournment, 1:30 p. m.

Before: George McCorkle, examiner.

Appearances: Mr. E. L. Smith, for the Commission; Mr. John Walsh, for the American Tobacco Company; Mr. Charles Caldwell, for the Lorillard Company; Mr. Joseph H. Taulane, for the Wholesale Tobacco and Cigar Dealers Association of Philadelphia.

MAX NEWMAN, was thereupon called as a witness, and having been duly sworn, testified as follows:

Direct examination by Mr. SMITH:

Q. Mr. Newman, what is your business?

A. Salesman for the Lorillard Company.

Q. How long have you been salesman for the Lorillard Company?

A. Ten years.

686 Q. Where do you travel from?

A. Philadelphia.

Q. Have you been traveling from Philadelphia those ten years?

A. Mostly; yes, sir.

Q. What is your title with the company?

A. Salesman.

Q. Do you work under anybody here?

A. Well, yes; I work under Mr. O'Mara.

Q. How long have you been working under Mr. O'Mara?

A. Just a year; one year.

Q. Prior to your working under Mr. O'Mara, whom did you work under?

A. Mr. Fitzgerald was here then.

Q. How many salesmen of your company are there?

A. I could not tell you right off-hand.

Q. Did you know that there was an association of jobbers in Philadelphia?

A. I heard some say of it on the street; yes.

Q. Did you hear that they had agreed upon a maximum discount?

A. No; I could not say that I did.

Q. Did you know that they were selling at a discount of 8 per cent at any time in 1920 or 1921?

A. Well, I could not say that I would be able to answer that question.

Q. Did you hear that they were?

A. No, sir.

Q. Did you hear that some of the jobbers were selling at 7 per cent discount from list?

A. No; in fact I never inquired about that.

687 THOMAS F. O'BOYLE resumed the stand and further testified as follows:

Direct examination by Mr. SMITH (continued):

Q. Mr. O'Boyle, in your investigation with the trade, or in your travels among the trade, did you find out the discounts that were being allowed in Philadelphia by jobbers outside of the Philadelphia district?

A. No, sir.

Q. I show you a form of the American Tobacco Company, which is in the following language: "To be written to Field Sales Managers on receipt of Jobbers' complaint regarding the demoralization of price conditions. Dear Sir: We understand (Jobber) is selling tobaccos and cigarettes at less than the customary price obtained in his community. Will you kindly advise us as to whether in your opinion (Jobber) activities are interfering with and endangering the distribution of our brands, and if so, would you advise we discontinue (Jobber) from the direct list of the American Tobacco Company." I ask you, Mr. O'Boyle, whether, when you were field sales manager of the American Tobacco Company in Philadelphia, you received a set of those forms or some of them?

Mr. CALDWELL. On behalf of the Lorillard Company I object to this testimony, and I ask that this objection apply to all this witness' testimony so that I may not have to repeat it.

688 EXAMINER MCCORKLE. Note Mr. Caldwell's objection.

Mr. CALDWELL. May it be understood that I do not have to repeat it.

EXAMINER MCCORKLE. Your objection has been noted, Mr. Caldwell.

Mr. CALDWELL. I just want to put on the record one general objection applying to this witness' entire testimony.

A. I am familiar with the blank.

Q. Did you receive those blanks?

A. The blanks; yes.

Q. Did you use any of them?

A. No, sir.

Q. Filled out none of them and sent them in to the company?

A. No, sir.

Q. After the issuance of the American Tobacco Company's circular No. 2783, did you learn the policy of the American Tobacco Company with respect to its customers?

A. Yes, sir.

Q. From whom did you get your knowledge?

A. I do not know who I got my knowledge from; it was discussed generally.

Q. Discussed by whom?

A. Well, it was discussed by my superior officers and myself, and I discussed it with other field sales managers when I met them.

Q. Who was your immediate superior?

A. Mr. Bevill.

Q. What did Mr. Bevill tell you would be the policy of the company regarding the customers of the American Tobacco Company?

689 A. Well, as I understood it, the company's policy in effect was this, that if any group of jobbers were selling merchandise at a minimum price, the company would take from the direct list any jobbers who demoralized that condition.

Q. Sold at less than the price prevailing in the community?

A. Yes, sir.

Q. Were you instructed by your superiors to carry out that policy in Philadelphia?

A. Well, in effect, yes.

Q. I show you a letter dated July 22, 1921, from G. B. Freitag to one Mr. Peaslee. Before I do that I ask you who Mr. G. B. Freitag is; do you know?

A. I think he is a field sales manager in the Chicago district.

Q. Who is Mr. Peaslee?

A. He was the sales manager of that section.

Q. I ask you to read this letter. First, I will ask to have this letter marked for identification. I show you this letter, Mr. O'Boyle, which has now been marked "Commission's Exhibit No. 31, for identification," and ask you whether this letter shows the policy of the American Tobacco Company.

Mr. WALSH. I object to that. It shows what it shows. He has asked the witness what it shows. It says itself what it is.

(Objection sustained.)

Q. I ask you whether the policy of the American Tobacco Company in Philadelphia while you were its field sales manager was the same as is disclosed in that letter?

690 A. As I understand it, yes; that is about the policy.

Q. I have a letter, Mr. Examiner, dated May 21, 1921, addressed by George W. Hill, vice-president of the American Tobacco Com-

pany, to Mr. Harry B. Finch, 1722 Hennepin Avenue, Minneapolis, Minnesota. I ask that this be marked for identification. I show you this letter, Mr. O'Boyle, which has been marked "Commission's Exhibit No. 32, for identification." I ask you to read that letter. Have you read the letter?

A. Yes.

Q. State whether that letter states the policy of the American Tobacco Company in Philadelphia in the period of the date of the letter and following that date?

A. Well, I don't know, because the condition that is described in that letter did not apply to Philadelphia.

Q. What is the condition mentioned in this letter which did not apply to Philadelphia?

A. The general demoralization of prices.

Q. You mean that that condition did not prevail in Philadelphia?

A. No, sir.

Q. But excepting that statement, the condition that there is in this letter was the policy of the American Tobacco Company as shown in that letter of policy of the American Tobacco Company in Philadelphia?

691 Mr. WALSH. I object to that form of question. This letter discusses a matter of broad principles and discusses numerous matters which may all be hypothetical as far as the Philadelphia situation is concerned, and it is an improper question to ask the witness, if that set policy in Philadelphia describes the policy of the manufacturers so far as Philadelphia is concerned. What might be the policy elsewhere might not be the policy in Philadelphia.

Mr. SMITH. That is what we are asking the witness.

Mr. WALSH. You asked the witness what the policy was in Philadelphia.

Examiner MCCORMICK: I think the witness can state his answer. It was his business and it was part of his duties to know the policy of the company. I think he can answer the question.

A. Yes; that was about the policy.

Q. What portion of this letter will you say indicated the policy of the American Tobacco Company in Philadelphia, and I will ask you to read it aloud so that the stenographer may get that portion of the letter which typifies the American Tobacco Company's policy in Philadelphia?

A. There is a part of this letter that isn't in line with any policy that I understood. First of all, and I will have to tell you what that is before I can go any farther, the part I did not understand is, "We feel very definitely here that when jobbers have co-operated and have held such conferences as Mr. Hill has suggested"; accord-
692 ing to my knowledge of the policy there was no one connected with the American Tobacco Company who suggested that jobbers hold conferences.

Q. So that in that respect is changed?

A. Yes. However, if any such conferences were held and it was agreed that the merchandise should be sold at a price, then the last part of this letter was the policy in effect: "Then the manufacturers can step in by refusing shipments or withholding orders from the demoralizers, and thereby assist those legitimate jobbers who desire to make a profit."

Q. Was Atlantic City in your territory?

A. Part of the time; yes.

Q. Was it in July, 1921?

A. I don't think it was after April, 1921.

Q. Did you learn that Mr. Charles Seider had been discontinued from the direct list of the American Tobacco Company while you were in the employ of the American Tobacco Company?

A. Yes, sir.

Q. How did you get your information?

A. Well, I don't remember whether I got it by telephone or letter or whether it was told me personally.

Q. From whom did your information come?

Mr. WALSH. He says he didn't know.

Mr. SMITH. But we have not asked him yet, but he should know who gave him the information, and that, Mr. Examiner, is the sense of this question.

A. I do not remember the individual, Mr. Smith.

Q. Was it an official of the American Tobacco Company?

A. I do not know whether it was an official or whether it was one of the executives.

Q. Were you told any reason why Mr. Seider was discontinued?

A. Officially, I do not think so.

Q. Unofficially, were you told?

A. I think I was.

Q. What reason was given to you for the discontinuance of Seider?

A. I think it was because—I understood at the time—I think he was selling merchants in Philadelphia at less than the price in effect here by this group of jobbers.

Q. Did you know that a jobber or jobbers in Philadelphia went to see or did see Mr. Hill, of the American Tobacco Company, in New York at any time?

A. I know the jobbers visited there occasionally.

Q. Where did you get your information?

A. Sometimes from the jobbers themselves; sometimes it was idle gossip in the New York office.

Q. What jobbers did you get your information from?

A. Well, any and all of them who visited the New York office.

Q. Did they tell you before they went to New York that they were going?

A. No, sir.

Q. Did you know that Mr. Eberbach, one of the respondents in this case, and Mr. Krull, went to New York to see Mr. Hill, of the American Tobacco Company?

A. No, sir; I don't think I did.

694 Q. Did you ever hear that they were there or that either of them was there?

A. Yes; I heard in the New York office they were there.

Q. When did you hear they were there?

A. Oh, it was some time in 1921; I don't just recall.

Q. Did you hear what they went there for?

A. No, sir.

Q. You were not present at any interview that Mr. Elberbach or Mr. Krull, or both of them, had with any of your officials or executives in New York?

A. No, sir.

Q. Did Mr. Elberbach ever tell you that he had been to New York to see Mr. Hill?

A. No, sir.

Q. Do you remember receiving from the sales manager of the American Tobacco Company a letter dated August 27, 1921, in which you were advised that Murphy Brothers, of Camden, New Jersey, were selling certain accounts less ten per cent, and that those accounts were the Philadelphia Wholesale Drug Company, the Post Cigar Company, and Jacob Glaser?

A. Yes, sir; I remember that.

Q. When you received that letter what did you do?

A. I visited the Post Cigar, and Glaser, and the Philadelphia Wholesale Drug Company.

Q. Did you find out whether Murphy Brothers were selling at ten per cent off?

A. I found out the price they were selling at; yes, sir.

Q. Do you remember the price that you found out they were selling at?

A. One price.

Q. What was that price?

A. Ten and one.

Q. Who was that?

A. Philadelphia Wholesale Drug.

695 Q. Did you find out the price they were selling Post Cigar Company?

A. No, sir.

Q. Or Jacob Glaser?

A. Not definitely; I did not find out the price they were selling Glaser at.

Q. Did you report to the American Tobacco Company the result of your investigation?

A. I think I did; yes, sir.

Q. Did you report in writing as to Glaser and Post Cigar Company, or did you report in some other way?

A. I reported by telephone.

Q. What did you report?

A. I reported that Murphy sold the Philadelphia Wholesale Drug at ten and one, and that he sold Glaser at better than nine and one.

Q. To whom of the American Tobacco Company did you make your report?

A. George W. Hill.

Q. One of the vice presidents of the company?

A. Yes.

Q. Do you remember writing a note or a letter on August 29, 1921, to Miss N. B. Fallon, care of the American Tobacco Company, New York?

A. Yes.

Q. Who is Miss Fallon?

A. She is Mr. Bevill's secretary.

Q. Do you remember that you stated in your letter to Miss Fallon: "Replying to Mr. Bevill's favor of August 27th relative to Murphy Brothers, Camden, I beg to advise that I have talked to Mr. Hill on the 'phone and gave him the necessary information"?

A. Yes.

Q. The letter dated August 27th, 1921, to you regarding the 686 Philadelphia Wholesale Drug Company, Post Cigar Company, and Jacob Glaser, with respect to the prices they were paying Murphy Brothers, was written by Mr. Bevill, was it not?

A. Yes.

Q. And is the letter that you refer to in your letter of August 29th to Miss Fallon?

A. Yes; that is right.

Q. After your report to Mr. Hill on the prices that Murphy Brothers were selling, state whether Murphy Brothers were retained on the direct list of the American Tobacco Company?

A. Well, I don't remember that.

Q. Don't you remember that Murphy Brothers were cut off?

A. They may not have been on when I made that report.

Q. Do you remember that they were cut off while you were in the employ of the American Tobacco Company?

A. Yes, sir.

Q. From whom did you get your information that they had been cut off?

A. I do not know that.

Q. That is, do you mean that you do not know the exact person who gave you the information?

A. I do not know the exact person; no, sir.

Q. Was it someone connected with the American Tobacco Company?

A. Yes; I think it was.

Q. Were you told the reasons why Murphy Brothers had been cut off?

A. No, sir.

Q. Did you know the reasons why Murphy Brothers had been cut off?

A. No, sir; not definitely.

697 Q. Well, did you know indefinitely?

A. No; I did not know indefinitely.

Q. Were there any jobbing firms in Philadelphia outside of Seider Brothers and Murphy Brothers who were cut off, whose shipments were held up by the American Tobacco Company during the period that you were field sales manager for the American Tobacco Company in Philadelphia?

A. Yes.

Q. What were those firms; what were the names of those firms?

A. One was Fermani; the other was Blumenthal.

Q. Anyone else.

A. I think that is all.

Q. Gordesky?

A. No.

Q. Did you ever investigate or have any one under you investigate the prices at which Fermani was selling or the discounts he was allowing?

A. No, sir.

Q. What do you say as to Blumenthal?

A. No, sir.

Q. From whom did you get your information that Fermani's shipments were being held up by the American Tobacco Company?

A. From Mr. Fermani.

Q. And from whom did you get the information that Blumenthal's shipments were being held up?

A. I think it was Mr. Blumenthal.

Q. Did you get that information as to Fermani from anybody other than Fermani?

A. I do not remember.

Q. What did you do when you were told by Fermani that his shipments were being held up? Did you take it up with your company?

A. I think I did; yes, sir.

698 Q. When Fermani told you shipments were being held up, did he tell you why they were being held up?

A. I do not think he did.

Q. What information did you get from the American Tobacco Company when you reported that Fermani had told you that his shipments were being held up?

A. I think I was instructed not to bother very much about it.

Q. Who gave you those instructions?

A. I do not remember any individual.

Q. Was it somebody connected officially or in an executive capacity with the American Tobacco Company?

A. I think it was; yes.

Q. What was said to you by your superiors when you reported that Blumenthal said that his shipments were being held?

A. I think his shipments came forward immediately.

Q. When you reported to the company that Blumenthal had told you that his shipments were being held up, what did the American Tobacco Company tell you, if anything?

A. I think they said that the shipments would go forward at once.

Q. Do you know the firm of J. D. Sisler Company, of Wilmington, Delaware, tobacco jobbers?

A. Yes, sir.

Q. Were they ever on the direct list of the American Tobacco Company?

A. Yes, sir.

Q. At what time?

A. Well, that was before I came to Philadelphia.

Q. Do you remember that they made application to be reinstated as a direct customer of the American Tobacco Company?

A. Yes.

699 Q. Do you remember what your recommendation was?

A. Yes, sir.

Q. I think it was against the reinstatement?

A. Yes, sir.

Q. What was the reason for recommending against their reinstatement?

A. Well, one of the reasons was that our business in the territory that they covered was very well taken care of by other customers. Another reason was that their purchases would be so small that it was not any hardship for them to get our products from some other jobber. They were not interested in tobacco; they were grocery jobbers, tobacco and cigars was a side line with them. That is about all.

Q. They were discontinued before the issuance of the American Tobacco Company's circular; before you came to Philadelphia?

A. Yes, sir.

Q. Do you remember circular No. 1350 of the Lorillard Company?

Mr. CALDWELL: I object to any statement of this witness about any of the Lorillard matters.

(Objection overruled.

Exception.)

Mr. CALDWELL: I object. It has got to be proved as a circular from the Lorillard Company and what it is he has referred to.

Mr. SMITH: I think, Mr. Examiner, Mr. Caldwell knows better than I do what circular No. 1350 is of the Lorillard Company. I was just asking this witness whether he knew there was such a circular.

Mr. CALDWELL: I object to the question. The witness cannot be supposed to know what the circulars of the Lorillard Company are.

Examiner McCORKLE: I have already ruled on it.

The WITNESS: I would not know it by number.

Q. Do you know that the Lorillard Company issued a circular to the jobbing trade in May, 1921?

Mr. CALDWELL. I object to the question. Unless the witness was present and saw the circular issued by the officers of the Lorillard Company, he is not in a position to answer this question as he has no personal knowledge. Unless he has personal knowledge of it he should not be allowed to answer the question.

(Objection sustained.)

By Mr. SMITH:

Q. Did you learn, Mr. O'Boyle, while you were field sales manager of the American Tobacco Company in Philadelphia, the attitude of the American Tobacco Company on sub-jobbers of tobacco products?

A. Yes, sir.

701 Q. What was that policy?

A. We did not recognize any sub-jobber.

Q. What do you mean by that statement, Mr. O'Boyle?

A. We only recognized wholesale tobacco jobbers and retail dealers.

Q. Did you learn the attitude or the policy of the American Tobacco Company with respect to its jobber customers recognizing sub-jobbers?

A. I do not think there was any policy.

Q. Did you learn the attitude or the policy of the American Tobacco Company on circular No. 2783 in so far as the jobber customer of the American Tobacco Company might give a better price to a sub-jobber than to the retailer?

Mr. WALSH. The thing to do is to tell what circular No. 2783 says.

A. There wasn't any policy in connection with that circular.

Q. Was there any policy of the American Tobacco Company in any connection regarding the customary price in a community as shown on circular No. 2783 as between a sub-jobber and a retailer?

Mr. WALSH. He has already said there was no policy.

Mr. SMITH. He has not answered this question or any question of similar import.

A. There was no policy at all affecting sub-jobbers.

702 Q. And I understood you to say, did I not, that the American Tobacco Company did not recognize the sub-jobber?

A. That is right.

Mr. WALSH. I move to strike out that question, because it calls for a conclusion.

Mr. SMITH. He explained in a previous answer what he meant by a sub-jobber. I was merely repeating his question.

(Objection overruled.)

(Exception.)

By Mr. SMITH:

Q. Now, did this circular No. 2783, Mr. O'Boyle, have reference to the customary price in any community to the retailer or to the jobber; which did it mean?

A. The price to the retailer.

Q. Did you receive a copy of circular No. 2783?

A. Yes, sir.

Q. Did you visit the trade to explain circular No. 2783?

A. Yes, sir.

Q. That is, your trade in Philadelphia?

A. Yes, sir.

Q. What explanation did you make to the trade in Philadelphia regarding circular No. 2783, known as commission's Exhibit No. 10?

A. I explained that our policy would be as follows: Wherever a group of jobbers were selling our merchandise at a price which returned them a satisfactory profit, we would discontinue from our list any jobber in that group who sold at a price under that which was the usual custom, and we would take from our list any jobber outside that group who came into that market and demoralized that condition.

Q. Did you make any explanation of this circular in so far as it might apply to jobbers who were not in your district and who might ship goods into Philadelphia to retailers?

A. Yes; I covered that.

Q. What do you mean, that the answer you just gave covered that situation?

A. Covered that situation; yes.

Cross-examination by Mr. WALSH:

Q. I want to call attention to your last statement, the announcement of policy, in comparison with the statement you made first. I think you made a statement in response to the question by Mr. Smith that where the jobbers agreed upon price. You stated last that where the customary price prevailed?

A. That is right.

Q. Then, if others in the group sold at a price which had no profit, then the company considered that such a jobber was an undesirable jobber. That is true?

A. Yes; that is true.

Q. You did not mean that where they agreed upon a price that you would adhere to that price and only recognize that price?

A. No; I do not mean where they agree because the company knew nothing about their agreeing—of course not.

Q. Did you ever in Philadelphia urge any of the jobbers to join the Philadelphia Jobbers Association?

A. No, sir.

Q. You took no part in the matter of the activities of the association in any way whatsoever?

A. None at all.

Q. Mr. Charles Seider, senior, and Mr. Charles Seider, junior, testified yesterday as to a conversation which they had with you in January, 1921, at their place of business in the city of Philadelphia. Do you recall that?

A. Recall the conversation or the visit?

Q. Do you recall having such a visit?

A. I do not know when it was; I visited Seider's place a couple of times.

Q. Mr. Charles Seider, junior, testified that you asked him if he would not comply with the prices that were given out by the association. Do you recall any such conversation or was there any such conversation?

A. I do not recall any; no, sir.

Q. If there was such a conversation you would have recalled it?

A. Well, I might.

Q. Do you know whether or not you did tell him anything like that?

A. I do not recall any such conversation; no, sir.

Q. He also testified in substance this, that if they adhered to the association prices it might keep them from having trouble about receiving their goods. Did you ever say anything of that kind?

A. I do not know that I did; no, sir.

Q. Mr. Charles Seider, junior, testified yesterday that after
705 the meeting in January that you talked to him, that you told him or advised him to go along with the association. Did you ever tell him that?

A. I can not remember having told him that; no.

Q. If you had told him, you would be likely to remember that?

A. I might have told him.

Q. Let's get this a little more accurate; I had the wrong page. Charles Seider, senior, testified that you said to him in January, 1921, "Have you joined the association yet?" To which he replied, "I have not been asked by the Philadelphia jobbers"; to which you replied, "It would be better for you if you did. It will be better for you that you get your goods later." Was there any such conversation of that kind?

A. I cannot remember any such conversation.

Q. Did you ever advise the Seiders to join the association?

A. I never advised anyone to join the association.

Q. Is it usual in communities where tobacco is being sold by jobbers for a customary price to prevail?

A. Yes, sir.

Q. And you were not concerned as to what that customary price was?

A. No, sir.

Q. All that you were concerned in, was if somebody was demoralizing what had become the customary price?

A. Yes, sir.

Q. And you were not interested or took any part in the establishment of any price by any jobbers anywhere?

A. No, sir.

Q. Mr. Smith asked you relative to a letter of May 2, 1921, George
706 W. Hill to Harry B. Finch, and asked you whether or not the policy asserted in that letter applied to Philadelphia. I understood you to say that it did not apply so far as the matter of cooperation of jobbers is concerned?

Mr. SMITH. I think, Mr. Examiner, that is a mistake. He said the letter was not correct; the situation in Minneapolis was not the same as it was in Philadelphia because there was no demoralization in Philadelphia.

The WITNESS. Not the general demoralization.

By Mr. WALSH:

Q. You didn't know anything about the activity of the jobbers? You didn't know anything about a resolution fixing a maximum discount?

A. No, sir.

Q. In response to a question by Mr. Smith you stated there was no general demoralization of the tobacco trade in Philadelphia. What did you mean?

A. I meant that a price was observed here in Philadelphia by a majority of the jobbers.

Q. That is, as far as you know that was the case?

A. As far as I know that was the case.

Q. Mr. Charles Seider testified to this, in substance: "I saw O'Boyle; he advised me to go along with the association and join the association, and I asked him if it would help us any in getting our shipments, and he said that he thought it would and advised me to see Mr. Narrigan. I went to see Mr. Narrigan."

I understand your statement is that you never advised any one to join the association?

A. No, sir.

Q. Or said to him if he joined the association it would help him to get goods?

A. No, sir.

Redirect examination by Mr. SMITH:

Q. Mr. O'Boyle, the explanation that you gave to the jobbers in Philadelphia of American Tobacco Company's circular No. 2783 was your own personal explanation, or was that an explanation that you had been instructed by your superiors to make?

A. I was instructed by my superiors.

Mr. JOHN L. McANINLEY resumed the stand and further testified as follows:

Direct examination by Mr. SMITH:

Q. Mr. McAninley, you have testified previously in these proceedings, have you not?

A. Yes, sir.

Q. Do you know one Max Newman of the Lorillard Company?

A. Yes, sir; quite well.

Q. How long have you known him?

A. Upwards of three or four years, I suppose.

Q. Did you ever know that Charles Seider had been cut off the direct list of the Lorillard Company?

Mr. CALDWELL. I object to this question on the ground that it asks for a conclusion.

Examiner MCCORMICK. This asks for knowledge.

Mr. CALDWELL. I object to it on the ground that first he has got to prove from his own personal knowledge that there was a direct list by the Lorillard Company, and he has got to know from his own personal knowledge that Charles Seider was ever on the direct list of the Lorillard Company, that he has seen that list, and in some manner has absolute personal knowledge with reference to this matter, and that he should not be allowed to testify from guess-work or hearsay.

Commissioner MCCORMICK. Just let the witness state the facts as he knows them.

Mr. CALDWELL. I object to that also. The witness first should be asked whether he is able to—

Commissioner MCCORMICK. I would rather he give us the fact as to whether he knows they were cut off. His knowledge might be sufficient that would be merely hearsay and incompetent, but I think he should give the facts.

709

By Mr. SMITH:

Q. Did you ever have a conversation with Max Newman of the Lorillard Company regarding Charles Seider?

A. I did.

Q. When?

A. On one occasion when I met Mr. Newman.

Q. When was that?

A. I could not say definitely when, but I imagine it was about the summer of 1921.

Q. Where did you have this conversation with Mr. Newman?

A. It was on Market Street near Fifth.

Q. When you speak of Market Street you mean Market Street, Philadelphia?

A. Market Street, Philadelphia.

Q. Tell us the conversation you had with Mr. Max Newman on this occasion?

Mr. CALDWELL. I object on the ground that it is incompetent, irrelevant, immaterial, and in no wise binding on the Lorillard, that it is not within the authority of Max Newman to make any statement which has any binding effect upon the Lorillard Company, and he would first have to ask if Max Newman had such authority to make the statement.

(Objection overruled.

Exception.)

A. We were talking about the general condition, and then Mr. Newman told me that Seider had been cut off.

710 Q. Cut off from where?

A. From the list of Lorillard Tobacco Company.

Mr. CALDWELL. I object to anything voluntary.

(Objection overruled.

Exception.)

A. And he told me at the time that Seider had been one of the oldest customers of the Lorillard Company, and when I asked him why—

By Mr. SMITH:

Q. Why what?

A. Why Seider had been cut off from the list he said it was because there had been something a Mr. Honowitz had said.

Q. Do you know whether Mr. Newman knew that the Jobbers Association of Philadelphia were selling at 8 per cent off?

Mr. CALDWELL. I object to this as calling for a double conclusion. First, does he know? Does he know that Mr. Newman knew?

(Objection overruled.

Exception.)

Mr. WALSH. Will you permit? I move that you strike out his former testimony on the same grounds.

(Motion overruled.

Exception.)

Examiner MCCORMIE. Just ask him, Mr. Smith, what he can tell you.

711 Mr. CALDWELL. I move to strike out this testimony.

(Motion sustained.)

Examiner MCCORMIE. Now state what you know about it.

A. On the different times we talked together—I used to meet him quite often—we discussed these conditions and we talked about the discounts that were allowed.

By Mr. SMITH:

Q. Can you give the exact conversation?

A. No; I can not give the exact words. At different times he told me we could get around this jobbers' association by going out of town.

Mr. CALDWELL. I move to strike all out. I further object to this on the ground that this is now referring to the same conversation with this gentleman to which he has testified fully on his former examination, and it is not proper at this time to open up that subject and go into it again.

Mr. SMITH. Mr. Examiner, in answer to the last objection I would like to ask that the gentleman be permitted to recall the witness for further cross-examination.

Examiner MCCORMIE. Of course he may.

Mr. WALSH. I further object to it on the ground that Mr.

712 Newman was requested to be present in court here to-day, and I produced him. He was asked a few preliminary questions and was then excused, and he has left this court room without any intimation on your part at all to us that Mr. McAninley was to come here and be reexamined as to his conversation with Mr. Newman.

Examiner McCORKLE. I will adjourn over until to-morrow to let you contradict anything you want.

A. At that time we bought stuff at different times from Mr. Newman, that is, when he was acting in a minor capacity, and he allowed us 8 per cent on our purchases.

Q. At the time when you were allowed 8 per cent by Mr. Newman, what were you being allowed by the members of the jobbers' association?

A. Eight per cent.

Q. Did you ever have any conversation at any time with Mr. Newman regarding the discounts allowed by the jobbers of Philadelphia who were members of the association?

Mr. CALDWELL. I object on the ground that first he must state the time and place. He can not do it all in one question.

The WITNESS. We talked in a general way about the prices and the conditions, but I could not state definitely the time nor the place.

713 By Mr. SMITH:

Q. But you have talked with him?

A. I have.

Q. Are you able to fix any time when you talked with him about discounts allowed by members of this association?

A. I could not fix any time.

Q. Can you fix the place or any particular place?

A. Yes; I can fix one particular place where I met him on Market Street near Fifth Street in Philadelphia.

Q. Do you remember when that was?

A. As far as I can remember it was in the summer of 1921.

Q. Now tell us what you and Mr. Newman said about discounts?

Mr. CALDWELL. He has already told us about that conversation.

A. That was one part of the conversation about Mr. Seider. I asked him how long it was going to last.

Q. How long what?

A. This organization, this maintaining the price at 8 per cent, was going to last, and he said he didn't know how long it would last, and it was at that time that he again brought up the subject of us getting out of this jurisdiction, saying that if we moved out of Philadelphia, out on the main line, he felt pretty sure we could get on the direct list.

Q. Did he say why he felt sure you could get on the direct list?

A. He didn't say why.

714 Q. Was there any other—

Mr. CALDWELL. Before you put that question I move to strike out the testimony of this witness on the ground that it is in no wise binding upon the Lorillard Company, that it has not been shown that Mr. Newman had any authority to make any such statement binding upon the company, or set any policy for this company, or that members of the association or he was present at any

time when any maximum discount was debated, and that the whole thing is incompetent, irrelevant, and should be stricken out.

(Motion overruled. Exception.)

Q. Was there any other occasion, outside of this one you have just related, when you and Mr. Newman discussed the discounts allowed by the members of the jobbers association?

Mr. CALDWELL. I object, first on the ground that he shall specify who the man was, and shall show some proof that this man was a member of the association, and some proof that Mr. Newman knows that this man was a member of this association, before he be allowed to answer that question.

(Objection overruled. Exception.)

715 A. We discussed them every time we met.

Q. How often did you meet?

A. Generally, around once a month; sometimes maybe twice a month. Mr. Newman lived near our store and occasionally dropped in on his way home.

Q. And on those occasions, do you mean to say you spoke about the discounts allowed by the association?

Mr. CALDWELL. I offer the same objection.

(Objection overruled.

Exception.)

Cross-examination by Mr. CALDWELL:

Q. Mr. McAninley, you have stated that Mr. Newman allowed an 8 per cent discount. Is that true? Did Mr. Newman ever allow you any discount of any kind?

A. Yes, sir.

Q. Didn't the jobber allow the discount, and not Mr. Newman?

A. On a certain occasion—

Q. Just answer yes or no. Didn't the jobber allow the discount, and not Mr. Newman?

A. In this case it was Mr. Newman that I refer to.

Q. In what way did Mr. Newman allow the discount?

A. Mr. Newman was working on certain brands—Climax, Union Leader Ready Cut—and he came to our place and sold us a quantity of it.

Q. In whose name were these goods sold? From whom were they purchased?

A. As I remember, we purchased them from Mr. Newman.

716 Q. Did you purchase from Mr. Newman individually as an individual?

A. From Mr. Newman, representing the Lorillard Company, I should say.

Q. Did you have any bill for any such goods?

A. Not that I remember.

Q. Did you have any bill from Mr. Newman for any such goods?

A. Not that I remember.

Q. Do you know whose individual goods these were?

A. I could not say other than Mr. Newman at the time—

Q. Didn't you know that these goods were the goods of some jobber in this town?

A. I could not say for sure.

Q. And don't you know that the sale was credited to some jobber in this town?

A. This—

Q. Don't you know that this sale was credited to some jobber in this town?

Mr. SMITH. Mr. Examiner, when this witness is answering the question, I think he should be permitted to answer it.

Examiner McCORMIE. Go ahead.

A. I do not know that it was credited to any other jobber.

Q. You don't know that?

A. No, sir; I am not sure.

Q. You have a pretty good opinion that it was?

A. It may be credited in this way; that Mr. Newman would take it up from another jobber and then go out and sell it. I would not have any knowledge of that.

717 Q. How did you pay for these goods, in cash or by check?

A. By check.

Q. To whom did you draw the check?

A. I think it was to Max Newman.

Q. Then you can produce the check?

A. I think so.

Q. Will you produce that check here to-morrow?

A. I will try and do that.

Q. Why didn't you give this entire story when you were on the witness stand before when you were asked if there was anything else you had stated about Mr. Newman?

A. I did not recollect at that time.

Q. You were asked to state everything that you had said to Mr. Newman.

A. Yes; but I did not remember that.

Q. How is it your recollection is refreshed since then?

A. I met Mr. Seider when I was going out of here last week, and one of the jobbers made me acquainted with him, and that is the first time I ever met Mr. Seider, and then it came to my mind that he was the jobber Mr. Newman had spoken to me about.

Q. And you carried in your mind for a week the name of a man you didn't know before that time?

A. Mr. Seider was very important in my mind because I never heard of him before in a **jobbing way**.

Q. What was the date of this conversation?

A. I can not give the date.

Q. What day of the week?

A. This time I met Mr. Newman on Market Street was on a Friday.

718 Q. Friday in what month?

A. I could not say that.

Q. What Friday in the month?

A. I could not say that.

Q. Were you alone?

A. I was.

Q. Was Newman alone?

A. Yes, sir.

Q. Mr. Seider was a sub-jobber, was he, or did you know whether he was or not?

A. I did not know until that time that he was a direct customer of the Lorillard Company until Mr. Newman told me.

Q. You did not know whether he was a direct customer, or whether he was cut off, or whether he was ever put on, except what you say Newman told you?

A. That is all I know about him.

Q. You are the one, I believe you said, who formed the sub-jobbers' association, or attempted to do it, in Philadelphia?

A. I attempted to do it.

Q. You got together about twenty-five or thirty of them?

A. There were twenty-two, twenty-five, or twenty-six.

Q. And you developed the fight between the sub-jobbers and the jobbers?

A. I do not say that I developed any fight; we did not get as far as having any real organization.

Q. Were you the spokesman of the sub-jobbers?

Mr. SMITH. Mr. Examiner, might I inquire at this time the purpose of this line of cross-examination?

719 Mr. CALDWELL. I think I have just as much right to go into this as you had.

Examiner MCCORMICK. Go ahead.

A. If it could be said they had a spokesman, I was. I wrote the letters for them.

Q. You presided at their meetings?

A. We did not go as far as to have any regular chairman; we just got together; each one put forth his ideas and we discussed them pro and con.

Q. In reference to this missionary work that you said Mr. Newman was doing. Just tell us what kind of goods it was that he sold you and how much?

A. I can not give you the quantities; I know that one of the brands was Union Leader Ready Cut.

Q. About how much was the bill?

A. On that particular occasion I could not say.

Q. You can give us your best recollection?

A. We bought from him at different times.

Mr. CALDWELL. I object to it on the ground that the association is disbanded.

(Objection overruled. Exception.)

Q. Did you attend any meetings of the association?

A. Yes, sir.

Q. Did your other partner attend any?

A. No, sir.

Mr. SMITH. That is all.

724 SAMUEL M. BLUMENTHAL was thereupon called as a witness, and having been duly sworn testified as follows:

Direct examination by Mr. SMITH:

Q. Mr. Blumenthal, where do you live?

A. 25 Sellers Avenue, Milbourne, Pennsylvania.

Q. What is your business?

A. Wholesale tobacco, cigars, cigarettes, and candy.

Q. Is that a partnership?

A. Individual.

Q. Who owns it?

A. My father.

Q. Are you one of the respondents in this case?

A. I think I am.

Q. Is your firm a member of the association of wholesalers?

A. Yes, sir.

Q. Did you attend any of the meetings?

A. Some.

Q. Did you know the rates of discounts that had been agreed upon by the association?

A. I heard about them.

Q. From whom did you hear?

A. From various salesmen that I met on the street.

Q. Salesmen of whom?

A. Of other tobacco jobbers.

Q. Did you get any notices from the association or any of its members?

A. I can not recollect.

Mr. SMITH. That is all.

725 PHILIP GORDESKY was thereupon called as a witness and, having been duly sworn, testified as follows:

Direct examination by Mr. SMITH:

Q. Where do you live?

A. Eightieth and Gibson Avenue, Philadelphia.

Q. What is your business?

A. Wholesale tobacco, cigars, and cigarettes.

Q. What name do you do business under?

A. Franklin Tobacco Company.

Q. Is the Franklin Tobacco Company a corporation?

A. A partnership.

Q. Who are the members of the partnership?

A. Myself and a brother.

Q. What is your brother's name?

A. Sidney Gordesky.

Q. You and your brother are both respondents in this case?

A. Yes, sir.

Q. Is your firm a member of the jobbers' association?

A. Yes, sir.

Q. Did you attend any of the meetings?

A. None of the general meetings.

Q. Did you attend any special meetings?

A. An executive meeting occasionally.

Q. Did your brother attend any meetings of the association?

A. Some few; yes, sir.

Q. Did you know of the adoption of the resolution fixing the discount at 8 per cent?

A. Yes, sir.

Q. Did you know also of the adoption of the resolution fixing the discount at 7 per cent?

A. Yes.

726 Q. Do you have with you any circulars of the Lorillard Company?

A. I have not, sir.

Mr. SMITH. That is all.

Mr. Examiner, I want to recall Mr. Eberbach.

Mr. EBERBACH resumed the stand and further testified as follows:

Direct examination by Mr. SMITH:

Q. You remember, Mr. Eberbach, when you testified previously that I asked you to get some information so that you could testify to it here?

A. Relative to what?

Q. Do you remember that I asked you for some additional information?

A. You asked me for some information relative to two letters that you have.

Q. Two sales at Bethlehem and Bangor of that section?

A. Yes.

Q. And you said, when you went on the stand, as I recall, that you did not know whether you had sold to certain parties at 7 per cent off list?

A. Yes.

Q. But that you would find out from your books whether you had sold them?

A. Yes.

Q. Have you looked up your books to find out whether you did sell them?

727 A. Yes. You wanted to know about one concern, Zimer and Company—

Q. Shimer & Company.

A. We have no account with any such party. If we ever sold them, it was possibly a cash sale; we have no record of it.

Q. I asked you also about the sale to someone in South Bethlehem or Bethlehem, did I not?

A. Yes; I cannot recall the name. You inquired about somebody in Bethlehem.

Q. Did you look up in your books?

A. Yes; we sold him in 1921 \$200.00 worth of merchandise.

Q. At 7 per cent off the list?

A. I presume it was 7 per cent.

Q. There are tobacco jobbers closer to South Bethlehem than Philadelphia is, are there not?

A. Yes.

Q. Were you present in this room this morning when Mr. Krull testified?

A. Yes.

Q. Did you hear his testimony?

A. I did.

Q. Do you remember that when you were on the stand in this proceeding before I asked you whether on any occasion you and Mr. Krull visited any official of the American Tobacco Company?

A. Yes.

Q. Do you remember that you said that you had not?

A. No; I told you that we did go to New York relative to the circular that was mentioned, and my recollection of the statement was that I did not recall seeing anybody else at that time.

728 Q. Do you remember that when you were on the stand previously in this case I asked you whether you, or whether you in company with anyone else, visited the Lorillard Company during the existence of the association of which you were president? Do you remember that I asked you such a question?

A. Yes.

Q. You answered that you had not?

A. My recollection of my answer was that I did not recall. Since that time Mr. Krull spoke to me and said we had visited the offices of the Lorillard Company.

Q. Now, you do say that you visited the offices of the Lorillard Company with Mr. Krull?

A. I do.

Q. What did you go there for?

A. We were in New York at the time, my recollection of it is, on this American Tobacco Company proposition as heretofore stated, and we called on the P. Lorillard Company. Exactly what was said at that interview—I do not recall what we talked about.

Mr. SMITH. Mr. Examiner, I have finished my case in Philadelphia, and ask for an adjournment until some time the early part of next week at the offices of the commission, 105 West 40th Street.

Examiner McCORKLE. This hearing will adjourn to 105 West 40th Street, room 911, Tilden Building, at half past ten o'clock, Tuesday morning, October 31, 1922.

729

BEFORE THE FEDERAL TRADE COMMISSION

FEDERAL TRADE COMMISSION

VS.

WHOLESALE TOBACCO & CIGAR DEALERS ASSOCIATION

Docket No. 886

ROOM 927, FEDERAL BUILDING,

New York City, N. Y., October 31st, 1922.

Met pursuant to adjournment, 10.00 a. m.

Before: George McCorkle, examiner.

Appearances: Edward L. Smith (Washington, D. C.) and Edwin B. Haas (Washington, D. C.) for the Federal Trade Commission; Messrs. Caldwell & Banister, attorneys for respondent Lorillard Tobacco Company, by Charles Caldwell, of counsel; John Walsh and Junius Parker, attorneys for respondent American Tobacco Company.

730

PERCIVAL SMITH HILL was called as a witness, and after being first duly sworn testified as follows:

Direct examination by Mr. SMITH:

Q. Mr. Hill, you are president of the American Tobacco Company, are you not?

A. Yes, sir.

Q. How long have you been president?

A. Since 1912.

Q. Is George W. Hill, one of the vice presidents of the American Tobacco Company, any relation to you?

A. He is my son.

Q. What department is he vice president of?

A. He has charge of sales.

Q. How long has he been in that position?

A. He has been vice president prior to my being president; he had charge of part of the sales for a number of years, and he has had charge of the entire sales for a matter, I should say, of six years. That is not quite, perhaps, accurate, but that is about it.

Q. When you say entire sales, do you mean sales over the entire—

A. I mean at one time he had charge of the sale of one department and for the last six or seven years he has had entire charge of sales of all the departments.

Q. I am assuming that you are familiar with these circulars that were issued to your jobber customers in 1921?

A. Yes, sir. I see every circular before it goes out.

731 Q. And do you approve of all of those?

A. Yes, sir.

Q. Who carries out the sales policies of the company?

A. The sales policy of the company is carried out by the organization under instructions from Vice President George W. Hill.

Q. In other words, you would say that Mr. George W. Hill is in charge of the sales policy of the company?

A. No; I would not say that; he is, in conjunction with myself and other vice presidents.

Q. You were in Europe in 1921, I understand?

A. Yes, sir.

Q. Prior to that time did you visit extensively in this country?

A. Well, I have not done much traveling for a number of years.

Q. Did you travel in 1921 in this country?

A. I really can not recall; I don't know.

Q. You don't remember where you were?

A. No; I do not.

Q. Were you in Minneapolis in 1921?

A. I don't believe so.

Q. Were you there in 1920?

A. I don't think so; I don't think I have been in Minneapolis since about 1914.

Q. Were you in Chicago in 1921?

A. Very probably; I am not sure, but very probably.

Q. Were you in Philadelphia?

A. Why, I have been in Philadelphia pretty nearly every year.

Q. You would say that you were in Philadelphia in 1920 and 1921?

A. I would not say that I was, but I would not say that I was not.

732 Mr. SMITH. I offer this as Exhibit No. 32 for identification; we are substituting this copy for the one that was originally marked "32" for identification.

(Paper referred to marked "Commission's Exhibit No. 32" for identification.)

Mr. CALDWELL. What is the date of it? Would you mind giving me the date of it?

Mr. SMITH. May 2, 1921.

By Mr. SMITH:

Q. Mr. Hill, you are familiar with your circular which is in evidence in this proceeding, and is known as Exhibit No. 10, are you not?

A. Yes, sir.

Q. Do you know to whom that circular was distributed?

A. Sent to all of our customers.

Q. All over the country?

A. Yes, sir.

Q. Did you approve this circular before it went out?

A. Yes, sir.

Q. Did your jobber customers call on you in New York?

A. Frequently.

Q. Did Mr. Eberbach, of A. B. Cunningham & Company, of Philadelphia, call on you in 1921?

A. I am certain he did, probably two or three times.

Q. Did he ever call in company with Mr. Herman Krull?

A. I don't recollect that they came together, although they may have done that.

Q. Do you say that Mr. Eberbach called on you several times in 1921?

733 A. I don't remember the year that he has not called several times.

Q. And you don't remember whether he called at one time with Mr. Fringes?

A. That I don't remember.

Q. Do you remember his having called with anybody?

A. Well, he frequently does, sometimes with Mr. Fringes, sometimes with another jobber. I know that he comes with some of his friends.

Q. Do you remember whether Mr. Eberbach and you, on any occasion in 1921 or 1920, discussed trade conditions in Philadelphia?

A. I think that is always the subject of his conversation.

Q. Do you know Mr. Krull?

A. Quite well.

Q. Was he to see you in 1921 at your office in New York?

A. I am positive he was, although I don't just recall the minute.

Q. And you can not remember whether he came accompanied by Mr. Eberbach or whether Mr. Eberbach was accompanied by Mr. Krull?

A. No; I can not remember.

Q. What was the nature of the discussion you had with Mr. Krull?

A. Well, I don't think a jobber ever calls but he discusses the trade conditions, and usually the unsatisfactory trade conditions.

Q. Can you state whether any one of these visits by Mr. Eberbach was after the issuance of your circular, which is known in this case as Exhibit No. 10?

A. I am sure some of his visits were after that date.

734 Q. Can you tell us whether any one of the visits of Mr. Krull was after the issuance of the circular of June 29, 1921, which is known as Exhibit No. 10?

A. No; I can't tell that because Mr. Krull's visits are not as frequent as those of Mr. Eberbach.

Q. But both Mr. Eberbach and Mr. Krull discussed with you trade conditions in Philadelphia?

A. They each did not, whether they both did, I don't know.

Q. Now, what were the trade conditions that either or both of them discussed with you?

A. I don't remember any particular interview, but every discussion has been about the unsatisfactory profits that arise from the selling of our merchandise.

Q. Now, what did either one or both of these gentlemen say to you in connection with their contention about unsatisfactory profits?

A. Well, of course, I don't remember that.

Q. Have you ever seen a letter written by Mr. George W. Hill to Harry B. Fringes, of Minneapolis, dated May 2, 1921?

A. I have seen a copy of it.

Q. How long ago did you see that?

A. Oh, I have seen that ever since this Federal Trade Commission inquiry came up.

Q. I hand you a copy of that letter, which is known as commission's Exhibit No. 32, for identification, and I will ask you what were the conferences, which, according to that letter, you suggested the jobbers have?

A. This letter was brought about by Mr. Fringes—

735 Mr. PARKER. Here are the letters, Mr. Smith—I mean if you want to refresh his memory.

WITNESS (continuing). Having written me complaining about trade conditions in his locality, and wanting to know what we could do about it. My answer to him was that we could not tell what to do about it; we would like to have a suggestion from him.

Q. Well, did you get a suggestion from him?

A. Yes; he suggested we get all the manufacturers together and agree upon some selling policy and fixing prices. That letter came, I think, in my absence in Europe, and was not answered for some time till Mr. Fringes wrote again wanting to know why we did not reply to his suggestion, and that was the occasion of Mr. G. W. Hill's letter of May 2d.

Q. That is the letter which is known as Exhibit No. 32 for identification?

A. Yes, sir.

Q. And your suggestion, or the suggestion of Mr. George W. Hill, for the company, was that when jobbers had cooperated and had held such conferences as you had suggested, then the manufacturer could step in by refusing shipments or withholding orders from the demoralizers, and thereby assist those legitimate jobbers who desired to make a profit. Is that right?

Mr. CALDWELL. I object on behalf of the Lorillard that this
736 testimony has no binding effect upon the Lorillard and should not be received as against the Lorillard, no matter what this witness states.

Mr. PARKER. I have no objection, but I do suggest the witness be permitted to refresh his memory as to a suggestion by counsel showing to the witness copy of witness's letter to Mr. Fringes of April 4, 1921, which I tendered.

Mr. SMITH. Mr. Parker, there is no suggestion that the memory of the witness needs to be refreshed.

Examiner McCORKLE. If the witness desires to have his memory refreshed, he can do so.

The WITNESS. Yes; I would be glad to.

Mr. SMITH. I object to this proceeding, Mr. Examiner.

Mr. PARKER. I think that is entirely fair. Counsel for the American Tobacco Company has handed to counsel for the Federal Trade Commission the entire correspondence, including a letter which Mr. Hill wrote to Mr. Fringes, and I think I have a right to suggest, and the witness says he would be very glad to refresh his memory; since the witness has stated he would like to have his memory refreshed, I see no objection to it.

Mr. SMITH. Now, Mr. Examiner, I want to ask one question. I would like to know who is conducting this examination of this witness. I do not know that I am called upon by the attorney
737 for the other side to refresh the witness's recollection whenever he sees fit, to any letter by a witness. This procedure is improper.

Examiner McCORKLE. I rather think it would be a better procedure for the attorney of the respondent to wait until his time comes to cross-examine the witness, or to suggest it to the counsel, of representing the memory of the witness, as you had some papers in your hand, but unless the witness had indicated some desire to have his memory refreshed, I think it was hardly the proper thing to insist on his so doing.

Mr. PARKER. Now, Mr. Examiner, it is perfectly true that Mr. Smith, counsel for the Federal Trade Commission, is conducting this direct examination, but I represent the American Tobacco Company; I had turned over to the counsel letters, and I think I have a right to protect, as against an inadequate statement by a witness, that is in a letter that I have a right to ask, in the proper protection of the witness, who is president of the American Tobacco Company, that the witness be permitted to refresh his memory.

Examiner McCORKLE. Even when he does not express any desire to have his memory refreshed?

Mr. PARKER. He has, undoubtedly, at my suggestion.

738 Examiner McCORKLE. After my suggestion.

Mr. PARKER. After my suggestion, that I think I had a right, in the proper protection of the president of my client—

Examiner McCORKLE. Well, we are not getting anywhere. The witness has replied to my suggestion, that he would like to have it, and he may do so, if he chooses to do so.

Mr. SMITH. Now, I have an unfinished question. Will you read it, please?

(Question repeated by reporter as above recorded.)

A. Won't you repeat that question, please?

(Question repeated by reporter.)

A. I did not suggest any particular co-operation or conferences; I just said that it would be a good thing for the jobbers to talk their business over.

Q. Well, without suggesting anything in particular to jobbers with respect to their business, you did suggest, Mr. George W. Hill, did suggest for the company, that jobbers hold conferences and the manufacturer would then step in by refusing shipments or withholding orders from demoralizers and thereby assist legitimate jobbers who desired to make a profit?

Mr. PARKER. Now, Mr. Smith, is that a question as to Mr. Hill's suggestion, the witness, or Mr. George Hill's?

Mr. SMITH. It is a question as to his last answer.

739 Mr. CALDWELL. I interpose the same objection on behalf of the Lorillard to this question, as to the other, and I ask here to be permitted to put in a general objection to this witness's testimony so I will not have to repeat it after each question.

Examiner McCORKLE. It is the same question asked a while ago to which you objected?

Mr. CALDWELL. Practically the same. May it be put on the record that this objection to this witness's testimony will apply to the Lorillard, so that I won't have to repeat it each time?

Examiner McCORKLE. Yes.

Mr. SMITH. Now, read the last question.

(Question repeated by reporter as above recorded.)

A. Our business depends upon certain methods of getting our product to the consumer; that is, we sell to the jobbers, they sell to the retailers, and the retailers sell to the consumers. It is necessary that the channels of distribution be satisfactory, it is necessary that the people making the distribution shall make a living.

Now, Mr. Hill, I do not like to interrupt you——

A. Excuse me, but I will have to——

Q. I want an answer to the question; if you want to give any reasons for your answers, you are in very capable hands here; you will have opportunity to give those reasons.

740 Mr. PARKER. Is the question as to Mr. Hill's suggestion?

Mr. SMITH. Yes.

The WITNESS. And suggested that jobbers confer with one another as to the evils of the situation.

Q. What are the evils that you suggested the jobbers confer about?

A. According to Mr. Fringes's letters to me, the prices were so unsatisfactory so as not to produce any profits for the jobber.

Q. That is, the prices charged by the jobber to the jobber's customers?

A. Yes, sir.

Q. And that was the situation you had in mind when you make the suggestion as to the jobbers holding a conference?

A. For the purpose of determining, really, what a satisfactory profit—what it cost them to do business.

Q. That is the suggestion you had in mind?

A. That they get together and talk over their business.

Q. The word "demoralizers" appears in this letter, known as Exhibit No. 32. Whom does the American Tobacco Company speak of as "demoralizers"?

A. They do not speak of any particular person, only somebody that disturbed the satisfactory conditions.

Q. And what is the satisfactory condition which is described by the party the American Tobacco Company calls a demoralizer?

A. The condition where our goods are being freely and satisfactorily distributed by our customers, somebody comes in and
741 upsets that by selling goods at a price where there is no profit, and where these people cannot make a living, is a demoralizer in prices.

Q. That is, a demoralizer is the firm who sells in a given community at less than the price prevailing there among the majority of jobbers?

A. Not necessarily; a demoralizer is a man who makes a price whereby—that the balance of the trade cannot make a living on.

Q. What was the policy of your company as to the demoralizer, as you define him, in 1920 and 1921?

A. Anybody who so conducts their business as to injure our business is an unsatisfactory customer and a demoralizer.

Q. That is, unsatisfactory to whom?

A. To us.

Q. Well, what did you do with the demoralizer?

A. Stopped selling him.

Q. How did you find out who the demoralizers were?

A. Through our representatives in the field.

Q. And did your company receive complaints from some other customers that given jobbers were demoralizers?

A. Frequently.

Q. And those complaints your company investigated?

A. Absolutely.

Q. And when you found that those jobber customers of yours were selling—strike that out. And when you found that the complaints made by your jobbers' customers were true, you refused to continue selling to the party you call a demoralizer. Is that right?

A. No; no.

Q. What did you do?

A. We had the situation investigated, and when our own
742 men reported to us that our business was being injured, we declined to sell the man who was injuring our business.

Q. Now, before declining to sell the man who was injuring your business, or before taking that action, the final cutting off from your list of direct customers, did you give any opportunity to the demoralizer, as you call him, to get better prices for his goods?

A. No, sir.

Q. When you found that a complaint made by a jobber against another jobber was justified, you discontinued selling the jobber complained of?

A. The complaint made by the jobber, our customer, had nothing to do with it, and we do not care about his complaint; we simply investigate that as we do everything else connected with our business to see whether our business was being injured.

Q. But you do receive numerous complaints in writing?

A. Yes.

Q. By your jobber customers against fellow jobbers?

A. Yes; mostly in a general way and very seldom specifically.

Q. Then do you write back and ask for specific information?

A. No, sir.

Q. Did you not refer the matter to the territory in which the demoralizer is located?

A. We did.

Mr. PARKER. The alleged demoralizer.

Q. And one of your men investigated the complaint, or rather the fact—

A. Yes.

743 Q. That was set up in the complaint made by your jobber customer?

A. Yes, sir; the investigation was made.

Q. And if the investigation revealed that the jobber was not selling at a price satisfactory to you, you discontinued selling him?

A. It was not a question of the price being satisfactory to us, it was merely a question whether the activity of this particular man was injurious to our business.

Q. Well, do you mean that you were not interested in the prices at which he sold?

A. Not a particle.

Q. And it was not for that reason that he was cut off?

A. Not at all; sometimes the price might be the object, sometimes other activities. We found people had other people's goods in our cartons; we cut them off, or for any other disturbance which injures our business, we take action about.

Q. You understand, Mr. Hill, I was asking you now regarding your cutting off those who sold at prices that were not satisfactory to you, do you understand that is what I am inquiring about?

A. Well, we are not interested in the price, except as it affects a given community. What is a satisfactory price in Texas may not be satisfactory in New York.

Q. How are you interested in price that is satisfactory in a given community, or to a given community, will you describe that?

A. If the goods are sold on a basis that provides a revenue to our customer, that enables them to make a living, the price is
744 satisfactory; if they can not make a living at the prices at which they sell goods, we do not want them for numerous reasons, credit reasons, and due to the fact that we want the channels of our distribution satisfactory to the people that do it. As a matter of fact we are pleased when our goods are sold cheap, provided the channels of trade are able to live.

Q. And by the channels of trade you mean the jobber or retailer?

A. Yes, sir.

Q. Were you familiar with the discounts your jobbers were getting in different places in the United States in 1921?

A. No, sir. When you say familiar, it varied so—

Q. Yes. Do you know that, for instance, in Chicago jobbers were allowing so much discount to the trade?

A. In Chicago—I never knew what discount they allowed.

Q. Now, is there any city whose discount you did know?

A. I do not think there was any one—

Q. But you did know—

A. From time to time I would inquire, but as a matter of fact, I don't know.

Q. Well, did you not know that in 1921 there were different organizations of jobbers effected throughout the United States?

A. That was a matter of trade gossip.

Q. That came to you from people in your employment, that information?

A. Sometimes.

Q. It also came, I suppose, through trade journals?

A. Sometimes.

Q. And what are the other ways by which you got that information?

745 A. I really do not know just how those things spread; we were not interested enough and had no reason for finding out especially about them.

Q. You were not interested enough in associations, I understand?

A. We were not interested in them at all.

Q. Well, in your opinion, what would be the best price—

A. Would be the best what?

Q. Best price at which a jobber should resell your products?

A. Well, that varied in different parts of the country.

Q. And where do you think, what part of the country did you think the jobber ought to get the highest price for your goods?

A. In that part of the country which is most thinly populated, where the expenses of doing business are greatest.

Q. And where did you think he could get along on lower prices?

A. Large centers of population, where the business is larger and the cost of distribution is not so great.

Q. Who determined for the American Tobacco Company what was a satisfactory profit in any given community or section?

A. They never had anything to do with it.

Q. Well, how did the American Tobacco Company arrive at a conclusion that a certain party, a jobber customer of the American Tobacco Company were selling at a price that was not giving him a satisfactory profit; what was the basis of that decision?

A. We did not care what profits—

Q. Yes; but I am trying to find out, Mr. Hill, how you arrived at your conclusion?

746 A. Well, in a given locality our customers come in and see us and tell us their affairs, and if I find, for instance, that a man is losing money on his goods, or is selling goods with a certain discount, it is very plain that he is not getting enough for his merchandise, and that occurred frequently in many places.

Q. Did I understand you to say that in different localities you had a different basis for the price which you considered satisfactory to the jobber?

A. We have no basis at all.

Q. To sell at retail?

A. We have no basis on price fixing.

Q. I am not speaking of price fixing at all, I am speaking of the profits of your jobbers.

A. We do not pay any attention at all to what profit he is getting until there is a general complaint as to one of profit.

Q. Now, how did this general complaint in 1921 arise?

A. Well, it was almost universal over the country that people were selling goods without profit.

Q. And you cut off some of your customers from your direct list?

A. I do not remember a single one that we cut off from our direct list on account of price. We cut a good many—not a good many—we cut a few off on account of credit.

Q. Can you tell us how many of your jobber customers you discontinued selling in 1921?

A. No; I could not.

Q. Can you tell us approximately?

A. Approximately?

747 Q. Yes.

A. No; I have no means of knowing.

Q. Did you cut off some in Kansas City—

A. I beg your pardon?

Q. I say, did you cut off some in Kansas City, Kansas?

A. I don't remember.

Q. Kansas City, Missouri?

A. I don't remember.

Q. Chicago?

A. Where?

Q. Chicago?

A. I don't remember.

Q. Milwaukee?

A. I don't remember.

Q. Cincinnati?

A. I don't remember.

Q. Central Pennsylvania?

A. I don't remember.

Q. Philadelphia?

A. I don't remember; I know we cut some off in Philadelphia, but they were for credit reasons, so far as I remember.

Q. Were those that you cut off in Philadelphia for credit reasons?

A. I cannot tell you that without referring to it.

Q. Do you remember one cut off in Philadelphia?

A. No.

Q. Do you know the American Cigar Company?

A. Yes, sir.

Q. What interest, direct or indirect, does the American Tobacco Company have in the American Cigar Company?

A. We have a controlling interest in the American Cigar Company.

Q. Mr. Hill, was there a circular issued by the American Tobacco Company to its jobbing customers after June 29, 1921, on price demoralization?

A. I really don't remember the date—I don't remember any dates nor any particular circular.

748 Q. Do you remember that there was more than one in 1921?

A. I beg your pardon?

Q. Do you remember that there was more than one in 1921?

A. Some circulars about price?

Q. Yes?

A. No; I don't, although there may have been. If you will submit me a circular, I can identify it.

Q. When this circular, which is known as commission's Exhibit No. 10, was issued, what instructions, if any, were given to the sales force of the American Tobacco Company regarding that circular?

A. I am not familiar with the instructions that were given.

Q. Do you remember whether an interpretation of the circular was—strike that out. Do you remember whether the sales force was instructed by the American Tobacco Company to give an interpretation to that circular to its jobbing customers?

A. They probably were, although I am not familiar with the instructions directly.

Q. You don't know what the instructions were?

A. I did at the time; I probably saw a copy of it, but I do not recollect them.

Q. Do you remember seeing the form letter gotten up by the American Tobacco Company to send out to those jobbing customers or to those customers who wrote in regarding circular No. 2783?

A. I don't recollect. I do not mean to say that I did not see them, but I do not recollect it.

Q. I show you a letter, form letter, dated November 5, 1921.

749 Can you tell whether that form is the form used by the American Tobacco Company in the connection suggested in my previous question?

A. Yes; I remember this is correct.

Q. Did that letter exemplify the policy of the company?

A. Yes, sir.

Q. In this letter appear these words, "We have no hesitation, however, in assuring you that where a customary price prevails in a given community, we are entirely within our legal rights in removing from our direct list of customers any customer who, by selling our merchandise at less than the prevailing price in that community, thereby disturbs the interest of our customers and distributors of our products"—do they not?

A. Yes. Now, permit me. I told you that we did not cut off customers on account of pricing; we cut off customers because they injured our business. Now it may be that a price lower than the prevailing price would injure our business, and therefore we might cut a man off on that account, but it would not be because of the price.

Q. It would be because of the injury that was being done to your business?

A. Exactly, and that injury would arise from their creating dissatisfaction with the balance of our distributors.

Q. And if dissatisfaction among the balance of your distributors in that community arose, you felt that to continue to sell that particular jobber or do any business with him would be injurious?

A. Yes, sir.

750 Q. Well, how did you determine or find out what the prevailing price was, or customer price was, in any given community?

A. Our men would tell us.

Q. Did you know that there were different organizations of jobbers in 1921 throughout the country?

A. Did I what?

Q. Did you learn in 1921 that there were different organizations of jobbers being organized, or then organized, throughout the country?

A. Yes; I heard that.

Q. Did you hear about the Milwaukee association?

A. Well, I know I must have; I don't just recall the Milwaukee association.

Q. And the Cincinnati association?

A. The same answer would apply.

Q. And the Philadelphia association?

A. Yes; the same thing; I heard of it.

Q. And did you hear that they were prevailing, in Philadelphia—strike that out. Did you hear that a majority of the jobbers serving the Philadelphia trade were allowing, at one time in 1920 and part of 1921, eight per cent off list price to their trade?

A. I had heard that; yes.

Q. Where did you get that information, Mr. Hill?

A. From our salesmen.

Q. Now, as to your policy in Philadelphia, after you learned that the jobbers there were selling, or the majority of jobbers were sell-

ing, at eight per cent off list price, did you consider that to be the prevailing price there?

A. I did. I don't see how they could sell any cheaper and live.

751 Q. And did you consider that anybody, any customer of yours who gave a better discount than eight percent, while the prevailing discount was eight percent, would be unsatisfactory to you?

A. I don't know that I did, but I would have.

Q. Now, did you ever hear, or did you know, that the rate of discount from list price in Philadelphia changed from eight to seven?

A. I heard that.

Q. And did you consider that price, that is net price, that seven per cent off list price, the prevailing and customary price for Philadelphia?

A. I am not sure that I ever did, because I don't believe that—I don't remember. I don't remember whether that discount ever became effective or not; I mean, I don't know whether the majority of jobbers got those prices or not.

Q. But you do, as to the eight per cent?

A. I do remember the eight per cent; yes.

Q. Now, assuming, and I am using that phrase because you say you don't remember, assuming that the majority of the jobbers in Philadelphia were getting list price, less seven percent, would you have considered that as the prevailing and customary price in Philadelphia?

A. I have no doubt I would.

Q. And would you have considered an unsatisfactory customer of yours a jobber who sold at any price less than the price which the seven percent off the list price would yield?

A. No doubt I would.

752 Q. Did you notify the trade, or did you have anyone connected with your company, notify the trade as to your policy of customary or prevailing prices, in a given community?

A. I don't think we ever notified them as to our policy in connection with any discount they gave; it was a notice of our general policy, the letter, the circular letter, that we sent out June 10.

Mr. PARKER. June 29, wasn't it?

The WITNESS. June 29!

Mr. PARKER. Yes.

Q. And won't you say that those who wrote in to you commending you on your circular letter 2783, were notified as to your policy of customary or prevailing prices, as you told them?

A. I don't remember just what was done.

Q. You remember that you sent those customers of yours this letter which I showed you on the stand?

A. Yes; I remember the sending of that letter.

Q. Mr. Hill, can you tell us the range of the purchases of your jobbing customers with respect to the range between your smallest customers and your largest?

A. I don't understand that; I don't think I heard you.

Q. I am trying to have you tell us, if you know, the range in the amounts of purchases by your jobbing customers from your smallest customer to your largest in monthly ranges, if you can give them to us that way.

753 A. Well, I suppose they vary anywheres from \$200 a month to close to a million dollars a month.

Q. Did you have many jobber customers who did approximately \$1,000 a month?

A. Oh, a great many—I would not say a great many, no; I should judge probably 10 percent of our customers bought from \$1,000 a month down.

Q. How many would you say bought \$2,000 a month?

A. \$24,000 a year, of course, this is blind guessing, you know. Twenty percent. When I say 20 percent I mean 20 percent of volume and not of numbers of customers.

Q. Well, can you tell us in percentage of customers?

A. How is that?

Q. Can you tell us in percentage of customers as to—

A. Well, put it in customers, there would not be much difference.

Q. In other words, the percentage of customers is about the same as the percentage of volume?

A. I would not say that offhand, I am just trying to give you a line to get the proper information.

Q. As I understand it Mr. Hill, you were not concerned with particular prices, you were only concerned with customary prices prevailing in given communities or sections?

A. Yes, sir.

Q. And did you not find that in different parts of the country jobbers were allowing different discounts?

A. Yes, sir.

Q. In some places jobbers were allowing seven and eight off the list?

A. And other places were allowing nothing.

754 Q. And other places charged list price less 20 percent?

A. List price less 20 percent; yes.

Q. Now, where jobbers in communities were getting list price, less 20 percent, what was your attitude of a jobber who sold in that community at a price which was better to the retailer than list price less 20 percent, did you consider that jobber a demoralizer?

A. No, sir.

Q. How did you look upon him?

A. Well, he was getting a good profit on his goods and we were glad to have him do it, but somebody that would come in and sell a little less, or a good deal less, for that matter, than his prices

would not hurt our business any, we were not interested in protecting his business, we were protecting our business.

Q. In other words, if, in a given community, all jobbers were getting list, less 2 per cent, then you were not interested?

A. Not at all.

Q. In any other jobber who would give four or five off?

A. Did not pay any attention to him.

Q. Do you remember that jobbers in central Pennsylvania were getting list, less 2 percent?

A. I don't remember that, although they may have been doing so.

Q. Do you remember that you cut off from your direct list jobbers in the territory of central Pennsylvania?

A. Won't you be more specific and tell me to whom you are referring, because I do not remember.

Q. Do you remember that in Harrisburg, and in that section
755 of Pennsylvania, the jobbers in 1921, after the issuance of your circular 2783, were selling to the retailer at two and two, do you remember that?

A. No.

Q. Mr. Hill, in 1921 were you familiar with the opinion of the Supreme Court of the United States in the Beech-Nut case?

A. As a layman would be; yes.

Mr. PARKER. In 1922 it was decided, wasn't it?

Mr. CALDWELL. Here it is [handing Mr. Smith paper].

Mr. SMITH. That is right. That is all.

Cross-examination by Mr. PARKER:

Q. How long have you been connected with the tobacco business, Mr. Hill?

A. Since 1894.

Q. And your first connection was with the Blackwell-Durham Tobacco Company?

A. Yes, sir.

Q. When did you become connected with the American Tobacco Company?

A. In 1898, I think it was.

Q. Your first official position with the American Tobacco Company was as secretary?

A. Yes, sir.

Q. And when did that begin?

A. I don't know the exact date; I think it was about 1900, at the time Mr. Joshua Brown died, I have forgotten what date that was.

Q. And thereafter you were made vice-president?

A. Yes, sir.

756 Q. And thereafter, in 1912, president?

A. Yes, sir.

Q. Has your connection with the tobacco business always been in the selling end or in the manufacture or leaf end?

A. It has always been in the selling end.

Q. How many jobbing customers has the American Tobacco Company?

A. I should say in the neighborhood of 6,000.

Q. These jobber customers presumably sell to retailers: how many retailers are there?

A. I suppose in the United States there are over a million.

Q. And the retailers sell to the consumers?

A. Yes.

Q. What is the utility of the jobber in the tobacco marketing situation?

A. He is very useful in seeing that the retailer gets the different brands that the consumer wants.

Q. What is the regular operation of getting the goods of the manufacture of the American Tobacco Company to the consumer?

A. The American Tobacco Company sells its goods to the jobber; he in turn goes around and distributes the goods to the retailer; the retailer in turn hands them out to the consumer.

Q. What reason induced you, representing the American Tobacco Company, to sell to the jobber instead of selling to the retailer?

A. It is a matter of convenience. It would cost us more money to go and sell the retailer direct. The jobber not only warehouses our goods, he gives credit for them, his salesmen are constantly soliciting business of our different brands; we could not do it as economically nor as effectively if we did it direct as we can through the jobbers' instrumentality.

Q. Does the price that the American Tobacco Company receives for its given products depend on the cutting or non-cutting of the prices to jobbers and retailers?

A. No, sir; we set a price—we place a price on our goods, as we sell them at the one price, irrespective of the price they get for them.

Q. Considering, from the point of view of single transactions, is the American Tobacco Company benefitted or injured by price-cutting by jobbers and retailers?

Mr. SMITH. Mr. Examiner, I object to that question because it is quite irrelevant and immaterial whether the American Tobacco Company is benefitted or injured by price-cutting. I assume that the retailer has a right to sell to whom he pleases, at what price he pleases, and whether that is an injury or benefit to the American Tobacco Company, I cannot see to be material in this proceeding.

Examiner McCORKLE. I do not know that it is material to this issue, but I will permit him to answer the question.

A. My feeling is that our business is benefitted by the cutting of prices all around.

758 Q. Why?

A. Because the consumer gets them that much cheaper.

Q. And the cheaper he gets a given article, the more he will consume?

A. That is the natural result.

Q. What is it that makes the American Tobacco Company interested in the jobbers securing a profit?

A. We have 6,000 jobbers on our books; if, for any reason, they go through bankruptcy, or unsatisfactory business conditions with a number of jobbers arises, our business is injured. It is absolutely essential that not only the jobber make a living out of selling our products, but that the retailer do also, otherwise jobbers will diminish, the number of retailers will diminish, and the whole success of the tobacco business is dependent upon the enormous distribution that occurs in selling tobacco. There is no single product in the United States that is manufactured that can be purchased in as many places as tobacco.

Q. What considerations operate on the mind of you and your organization when application is made by an existing or prospective dealer to be put on the direct list of jobbing customers?

A. The main thing we consider is whether our business will be benefitted by the addition of that account to our books. Of course, he has to be financially responsible before that is taken into account, even.

Q. How do you mean that where the adding may benefit your business, and what considerations enter into that determination?

A. If the addition of a customer to our books would produce an increased distribution, would get our goods on sale in more places than exist to-day, we would consider that that would benefit our business.

Q. And that involves the consideration of the territory to be served?

A. Naturally, in some; yes, sir.

Q. Do you know Harry B. Finch?

A. Yes, sir.

Q. Who is he?

A. He is an officer of certain wholesale—in a certain wholesale grocery house, and is connected—I do not know whether officially or not—with a number of wholesale grocery houses known as the Nash Houses in the Northwest.

Q. What do you mean by the Northwest, Minnesota?

A. I mean the Dakotas—North and South Dakota—and Minnesota.

Q. So far as you know, did you see Harry B. Finch in New York or Chicago or Minneapolis or anywhere else, in 1921?

A. Not that I can remember.

Q. You say that he is connected with the Nash Wholesale Grocery Houses?

A. Yes, sir.

Q. Do wholesale grocery houses distribute tobacco?

A. Very largely, in the West.

Q. In the eastern cities, including Philadelphia, who are the wholesale distributors of tobacco, are they tobacco dealers, or wholesale grocers?

A. Almost exclusively tobacco dealers.

760 Q. But in the West and perhaps in the South, the tobacco distribution—

A. Is largely in the hands of wholesale grocers.

Q. Mr. Hill, I show you a letter that purports to be from Harry B. Finch, dated April 1, 1921, and ask if you received that letter?

A. I did.

Q. This letter refers to the activities of Russ-Parker-Martin Company of Duluth, Minnesota. Who are they?

A. They are wholesale grocers in Duluth.

Q. Reference is also made to the Creasy Corporation of Grand Falls; do you know who they are?

A. Yes, sir.

Q. Who are they?

A. They are a co-operative association that has as stockholders retailers and sells different supplies to their stockholders.

Q. I notice reference is also made to the Stone-Ordean-Wells Company; who are they?

A. They are wholesale grocers at Duluth.

Examiner McCORKLE. Gentlemen, it is just half-past twelve. We will adjourn until two o'clock.

(Whereupon, at 12.30 o'clock p. m., a recess was taken until 2.00 p. m.)

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AFTER RECESS

Parties present as before.

Mr. PARKER. Mr. Smith, I am going to have this marked for identification. Will you please mark that letter "American Tobacco Company Exhibit for identification 1"?

(Paper marked "American Tobacco Company Exhibit 1, for identification.")

PERCIVAL SMITH HILL resumes the stand.

Cross-examination continued by Mr. PARKER:

Q. Mr. Hill, in the letter from Mr. Finch to you of April 1, 1921, with respect to which I was examining you when the recess for luncheon occurred, which letter is now marked "American Tobacco Company Exhibit No. 1, for identification," I observe this sentence, "I am writing to ask if, in your judgment, such a condition"—referring to price-cutting condition thereinbefore referred to—"is not injurious to the interest of the manufacturers, and if so, the manufacturers may not be willing to use their good offices to bring about an adjustment that will reestablish regular discounts?" Were letters substantially like this frequently coming to you in 1921 and in previous years?

A. Yes, sir.

Q. Has that been true ever since you have been connected with the tobacco business?

A. Yes, sir; twenty years.

762 Mr. PARKER: I now ask the stenographer to mark this as "American Tobacco Company Exhibit No. 2, for identification."

(Paper referred to marked "American Tobacco Company Exhibit 2, for identification.")

Q. Did you reply to this letter from Mr. Finch, American Tobacco Company Exhibit 1 for identification?

A. Yes, sir.

Q. You stated in that letter, "I regret to see a disposition on the part of a number of our friends to cut prices on tobacco. I believe it is injurious to our cause." How was that injurious to your cause, and what do you mean by the phrase "our cause"?

A. By "our cause" I meant the sale of our products, and injurious to the selling of our products—by saying injurious to the sale of our products I meant that our business is not benefitted by a dissatisfaction that is created among our customers.

Q. You also stated in this letter, American Tobacco Company Exhibit for identification 2, "I do not know, however, just how to go about it and would be glad to have a suggestion from you. It does seem to me that a conference among jobbers themselves would do more to correct an evil of this kind than any other one method." Is that the only suggestion that you made to Mr. Finch as to conferences among jobbers themselves?

A. Yes, sir.

763 Q. How did you assume that conference among jobbers themselves would do more to correct an evil of this kind than any other one method?

A. Well, I think I have stated that the prices and discounts in the selling of our merchandise varied in the different sections of the country on account of the expense involved in the distribution.

Now, what those discounts shall be are usually adjusted, always from my experience, always adjusted by what you might call natural competition. Well, that is not by agreement, that is by the necessities of the case, and becomes, as a matter of course, unless those conditions are upset by what you might call unnatural competition, that is, false statements that are made either by one jobber to another or by the salesmen of one jobber about another salesman, and it has been my experience that a frank discussion as to the conditions of a business in a community eliminates those rabid actions that are brought about by anger or jealousy, or something of that kind, and that if jobbers will get together and discuss their business, those unnatural methods of competition will be eliminated.

Q. Did you intend to suggest to Mr. Finch in this letter an agreement among jobbers fixing prices?

A. Certainly not.

MR. PARKER. I hand to the stenographer a letter purporting to have been written by H. B. Finch to Mr. Hill, on April 6, 1921, and ask that it be marked as "American Tobacco Company Exhibit 3, for identification."

(Paper referred to marked "American Tobacco Company Exhibit 3, for identification.")

Q. Mr. Hill, you went to Europe in the spring of 1921, I believe?

A. Yes, sir.

Q. Do you know whether you personally received in due course after its mailing letter purporting to be written by H. B. Finch to you under date of April 6, American Tobacco Company Exhibit for identification 3?

A. No, sir.

Q. You mean you do not recall?

A. I didn't receive it; I was out of town.

Q. Where was this American Tobacco Company Exhibit for identification 3 gotten?

A. Where was this letter gotten?

Q. Yes.

A. Out of the files of the American Tobacco Company.

Q. Mr. Finch seems to have stated in his letter of April 6, American Tobacco Company Exhibit for identification 3, that if possible the leading manufacturers, to wit, Liggett & Myers, R. J. Reynolds Tobacco Company, P. Lorillard and Company, and the American reach an agreement respecting the policy to govern sales to customers; who were those manufacturers mentioned there, and what are their relations to the American Tobacco Company?

A. Well, they are people engaged in the manufacture of tobacco and cigarettes, and they have no relations at all with the American Tobacco Company.

765 Q. Are they competitors of the American Tobacco Company?

A. They are, indeed.

Q. In American Tobacco Company Exhibit 3 for identification, Mr. Finch says, "My reasoning is that if the jobber is an economical and valuable means of distribution, then, for his services, he should receive reasonable compensation." Did you and do you agree with that statement?

A. I certainly do.

MR. PARKER. I ask the stenographer to mark the letter which I hand him as "American Tobacco Company Exhibit for identification 4," being letter of H. B. Finch to Mr. Hill of April 28, 1921.

(Letter referred to received and marked "American Tobacco Company Exhibit 4, for identification.")

MR. CALDWELL. Mr. Examiner, I wish to interpose an objection on behalf of the Lorillard Company to any letters from Mr. Finch, as well as any testimony by this witness, as not binding on the Lorillard Company.

Q. This letter of April 28 refers to a previous letter written by Mr. Finch of April 6, and calls on you to give an answer to that letter. Did you receive that letter of April 28, 1921, American Tobacco Company Exhibit 4, for identification?

A. No.

Q. Where was that letter obtained?

A. From the files of the American Tobacco Company.

766 Mr. PARKER. Mr. Smith, what is your exhibit of Mr. George Hill's letter of May 2nd?

Mr. SMITH. Thirty-two for identification. I have not offered it yet. Here it is.

Q. You were not personally aware at the time it was written of the letter of George W. Hill to Mr. Finch, commission's Exhibit No. 32?

A. No, sir.

Q. Now, Mr. Hill, did you in an interview in your office in 1921, 1920, or at any other time, advise or urge any member of the firm of Murphy Brothers to join any association of tobacco jobbers?

A. I certainly did not.

Q. Did you advise him in words such as "Go along with the association" or any other words indicating your desire that he should join or cooperate with the association?

A. No, sir.

Q. Why are you so positive in that statement?

A. Because I never advised anybody to that effect. I always said we had nothing to do with them.

Q. Did you ever advise jobbers that you were indifferent as to whether they became members of any association or not?

A. That is exactly what I told them, we did not care whether they were or were not members of an association.

Q. During the period of 1921, were the firm of Murphy Brothers at Camden, New Jersey, ever removed from the direct list of
767 of jobbers of the American Tobacco Company?

A. My recollection is they were removed several times.

Q. Why?

Mr. SMITH. Examiner, I object—

A. I beg your pardon?

Mr. SMITH. I object to the question, because there is evidence in this case in writing. Now, if there is any other reason, it is in writing, the written document showing the reason should be produced.

Mr. PARKER. I am not asking what reason he gives. I am asking him the reasons that induced him to remove Murphy Brothers from the list of direct customers.

Mr. SMITH. Mr. Examiner, the reason appears in this record already. It is in the record of the American Tobacco Company. This is an attempt to contradict by parole a written record of the American Tobacco Company, and I object to it.

Examiner McCORKLE. Well, I can not permit it, then.

Q. Why were they cut off when they were cut off?

A. They were cut off for credit reasons.

Q. What was the average condition of their account during 1921?

768 A. They were always behind in their payments, and the amount they owed us was considerable.

Q. Did you have—in an assumption, how much does that mean, Mr. Hill?

A. Well, they owed us at various times during 1921—oh, anywhere from eighteen to thirty-five thousand dollars.

Q. Did you have interviews with members of the firm, one or both, as to the condition of their account?

A. Yes, sir; several.

Q. Did you hear, during 1921, that they were selling goods at a very low price?

A. Yes; I heard that they were selling goods less 10 and 1 per cent, and we allowed them 10 and 2.

Q. That gave them a gross profit of—

A. One per cent.

Q. Is your familiarity with the tobacco business sufficient to enable you to give an opinion as to whether that enables one to pay his expenses?

A. It can't be done.

Q. In your discussions with one of those members of the firm of Murphy Brothers, your discussions during 1920 and 1921, did you refer to that low price they were making, or as you understood they were making?

A. Yes, sir.

Q. Where did you get your information that they were making that low price?

A. I got it from our salesmen.

Q. How did you discuss that low price they were making with respect to their credit condition, or were the two discussed together?

A. They were practically discussed together, that they owed so much money; they were not paying their bills promptly, and
769 how could they expect to continue in business at a profit, selling their goods on a one per cent margin.

Q. And according to your recollection during the period of 1919, 1920, and 1921, they were, for those reasons, off the list two or three times?

A. Yes, sir.

Q. Was anyone in the organization of the American Tobacco Company in 1920 or 1921 in Philadelphia, or any other place, authorized to urge jobbers to join any association?

A. No, sir.

Q. Were they authorized to advise that they join any association?

A. No, sir.

Q. Were any of such representatives at any time authorized to represent to any jobbers that unless they followed the line or worked

in with or joined any association, they would be liable to have trouble in getting goods?

A. No, sir; not at all; we never recommended an association any place; we confined our transactions with our customers to them as individuals and positively declined to recommend an association for any purpose.

Q. In your direct examination to the questioning of Mr. Smith, you stated that you relied on your field agents to determine whether to refuse to sell jobbers further or not, and that determination was based on injury to your own business. Who made the determination?

A. Those field salesmen reported the facts in connection with a given account, and these facts were submitted to me, and it was I that decided as to whether they should be continued or discontinued.

770 Q. Does that apply when you were at the office and not away?

A. Naturally.

Q. Does that apply to all people removed from the list, except for routine, credit reasons?

A. Well, it applies to all people that are removed from the list for specific reasons. I mean by that, people going out of business or withdrawing from a bank or something of that kind. I do not pay any attention to that, but for anything specific, the decision as to whether they shall remain on the direct list or not comes up to me, finally.

Q. Did you ever exercise your judgment and remove a man, a jobber, from the list because of failure to belong to or co-operate with—

A. No, sir.

Q. Any Philadelphia association or any other association?

A. No, sir; never.

Q. You stated in response to questions by Mr. Smith that you did not recall any Philadelphia jobber who had been discontinued as a jobber during the year 1921?

A. Yes, sir.

Q. Murphy Brothers you have just said were a Camden firm, and therefore not included?

A. Yes.

Q. Was the Charles Seider account as a jobber discontinued in 1921?

A. No, sir.

Q. Were orders at some time during that period of Charles Seider withheld?

A. Yes, sir.

Q. Were his shipments withheld?

A. Yes, sir.

Q. What was the reason for the withholding of shipments?

771 A. Our people—I don't remember a particular case, but the way it would happen would be that our people would report

to us that Seider was doing something that was injuring our business; we would discontinue the shipments in order to investigate the facts in connection therewith; if we found that was so, that this man or any man was injuring our business, it would be made effective and we would discontinue the account. If we found his activities were not contrary to the interests of our business, we would renew the shipments.

MR. SMITH. Mr. Examiner, I move to strike this answer out because it is not an answer, it is an answer of general application; he has not confined it specifically to the discontinuance of the Seider account.

MR. PARKER. Well, if that is true, it cannot hurt anybody.

MR. SMITH. I think we ought not to have testimony as to generalities, but when a question is asked referring to a specific discontinuance of an account, the answer ought to be confined to that specific account.

EXAMINER MCCORMIE. I think so.

Q. You say, Mr. Hill, that so far as the Charles Seider account is concerned, you don't recall—I am not now speaking as to an exact date—but you do not recall that it was discontinued?

A. Well, I know that it was discontinued, because I had 772 the records investigated, and they informed me of it. I know they stopped shipping for a period of time to Charles Seider because I had the records brought down to me, I would not have known it from recollection.

Q. Do you remember anything about a discontinuance of shipments to B. Feimany?

A. I knew that in the same way; the records were shown me and the facts were told me. I would not have recalled it.

Q. Do you recall with respect to either of these last mentioned, Charles Seider or B. Feimany, whether you heard of their increased business or their selling goods at what you deemed very low cost?

A. No, sir; I don't remember that.

Q. In American Tobacco Company Exhibit for identification No. 1, Mr. Finch of Minneapolis wrote you about price cutting conditions and asked your aid; was that letter invited by any previous letter written to him by you?

A. No, sir.

Q. Or any interview which you had had with him?

A. No.

Q. Or any message sent by you to him?

A. No, sir.

Q. Has the American Tobacco Company, in your administration as president, in 1920, 1921, or at any other time, invited jobbers to report when other jobbers were cutting prices?

A. No, sir; we don't like to hear anything about it; we don't ask for any information; we really don't want to know about it.

773 Q. Had you at any time following the circular, commission's Exhibit No. 10, or theretofore, arranged for any system or machinery or jobbers reports to you?

A. No, sir; there are no such reports.

Q. Did you, before the issuance of that circular, or thereafter, or at any time, act on jobbers reports or complaints, except to seek information?

A. No, sir; none of their reports were acted on, and usually they are incorrect.

Q. Have you any system of reports from salesmen or sales managers as to price maintenance by jobbers, other than it is the duty of salesmen to report everything of interest in the trade?

A. No, sir.

Q. Have any of the salesmen in the employ of the American Tobacco Company any joint arrangement with jobbers so that they represent at the same time the American Tobacco Company and jobbers?

A. No, sir.

Q. Is the only interest of the salesmen in the preservation and extension of the business of the American Tobacco Company?

A. That is their only interest, to look after the distribution of our products.

Q. Mr. Hill, I show you commission's Exhibit No. 13, purporting to be a copy of a letter written you on October 29 on the letterhead of Schoenfeld & McAninley, of Philadelphia. Do you have any recollection of receiving that letter?

A. No, sir; the first time I saw that letter was to-day.

Q. Since the introduction of this in evidence on the 19th of 774 October, have you caused a search to be made through the files of the American Tobacco Company for that letter?

A. I never did personally; I don't know anything about it.

Q. Wasn't the fact of this letter called to your attention soon after the 19th, I mean?

A. Of October?

Q. Yes; of this year?

A. Well, there was—I think it was reported that there was such a letter, by Mr. McAninley, whose name I did not recognize.

Q. And did you cause an examination then to be made, so far as you know?

A. I did not give any instructions myself.

Q. And you don't know whether it was found or not?

A. I don't know.

Q. So far as you know, you never got that letter?

A. I never got it, to my knowledge.

Q. This refers, Mr. Hill, to the situation of the sub-jobbers in Philadelphia. What is a sub-jobber?

A. A sub-jobber is a man, usually he has a retail business and in addition to that goes around and solicits the business of other retailers, but he is not on the direct list of our company.

Q. Have you to-day read this letter from Mr. McAninley?

A. I have.

Q. Did there exist any condition in Philadelphia that enabled the American Tobacco Company to be of aid to the sub-jobbers, so far as you know?

A. No; we didn't know who were sub-jobbers unless we specifically inquired about a particular person; we have no list of 775 sub-jobbers; we didn't know who the sub-jobbers were.

Q. Is it a part of the policy of the American Tobacco Company, or of special interest to the American Tobacco Company, that the sub-jobbers should be eliminated?

A. No; we don't care; they are simply customers of our customers.

Q. You had heard, had you not, Mr. Hill, that the so-called customary maximum discount in Philadelphia of eight per cent, leaving a profit of only four per cent, applied to all the customers of the Philadelphia jobbers?

A. That is my understanding.

Q. Was the determination of any jobber to make that equally applicable to sub-jobbers and retailers to your interest?

A. No; I had nothing to do with it.

Q. After it had once been determined upon, was it continued at your instance or the instance of the American Tobacco Company?

A. We did not care anything about it.

Mr. PARKER. I hand the stenographer a paper and ask him to mark it "American Tobacco Company's Exhibit for identification 5"

(Paper referred to marked "American Tobacco Company's Exhibit 5, for identification.")

Q. I call your attention what purports to be a circular, to wit, circular No. 2748, issued by the American Tobacco Company, 776 American Tobacco Company Exhibit for identification 5

which seems to be an authorization to jobbers to deliver with certain sales, to wit, sales of twelve cartons of products of the American Tobacco Company, provided such include at least one carton of "111" cigarettes, 100 "Sweet Caporal" cigarettes, free with a promise by the American Tobacco Company that it would pay or give a credit memorandum to the jobbers covering such "Sweet Caporal" cigarettes, and I note in this circular that this offer does not—the statement that this offer does not apply to goods bought for the stocks of our direct customers or sub-jobbers of shipments to the retail departments of either, but it is for the benefit of the retailer only. Why did you eliminate from the benefit of that circular the sub-jobbers?

A. Well, we sell our customers goods at a certain price. This is an additional offer that we want our customers to offer to the retailers for the purpose of distributing this "111" cigarette. Now, if we permitted sub-jobbers to get the benefit of this free gift and without restrictions, they go to the balance of the retail trade, they owning their stocks cheaper than our own direct customers, and therefore would come into unfair competition with them.

Q. What is that circular really intended to accomplish?

A. It is intended to introduce this "111" cigarette to the retail trade. When I say introduce, I mean to place on sale in their stores that cigarette.

777 Q. Was the "111" then a comparatively new cigarette?

A. It was.

Q. And the "Caporal" was a well-known cigarette in Philadelphia?

A. Well-known, staple cigarette, that every retailer bought.

Q. And the purpose of this was, in a sense, to advertise, that is, to bring on the retailers' shelves, the "111" cigarette?

A. It was very essential that it be on the retailers' shelves, because we were at that time advertising that cigarette to the consumer in Philadelphia, and there is not much use advertising a product if it cannot be had when he goes to the retail store.

Q. And if this offer had been availed of by the jobber himself, or the sub-jobber, then it would not accomplish its purpose of getting it upon the retailer's shelves?

A. It would not.

Q. Mr. Hill, you have said in answer to the direct examination of Mr. Smith that Mr. Eberbach undoubtedly visited you in 1921, and that you had no reason to deny that Mr. Krull visited you. Did you say to either of these gentlemen, or both together, that the American Tobacco Company would support or co-operate with, or further the activities of their association?

A. No, sir.

Q. In any way?

A. Not at all.

Q. How do you know you never said that to them?

A. I never said that to anybody; I could not have said it to them. It is not because I remember the conversation, I just know it did not happen.

778 Q. Because you never said it to any jobber?

A. Yes.

Mr. PARKER. That is all.

Mr. CALDWELL. No examination that would interest the Lorillard.

Mr. SMITH. Mr. Examiner, I offer this Commission Exhibit No. 32 for identification and ask that it be marked "Commission's Exhibit 32."

(Paper referred to received in evidence and marked "Commission's Exhibit 32.")

Mr. PARKER. I offer in evidence these different papers which have been marked for identification as "American Tobacco Company's Exhibits 1, 2, 3, 4 and 5," respectively, and I ask that they be marked with those numbers.

(Papers referred to received in evidence and marked, respectively, "Tobacco Company's Exhibits Nos. 1, 2, 3, 4, and 5.")

Re-direct examination by Mr. SMITH:

Q. Mr. Hill, you said on your cross-examination that you did not tell Mr. Eberbach and Mr. Krull, either of them, that you would co-operate with the association. Do you remember saying that on your cross-examination?

A. Yes.

Q. Did you say, however, to Mr. Eberbach and to Mr. Krull, 779 or to either one of them, that you would assist them and other Philadelphia jobbers so that they may be selling under a discount satisfactory to them?

A. I don't know just what form that took.

Q. Now, tell us what you did say to them?

A. I can not tell, of course, what I did say, but I probably said that we would co-operate with the jobber not being able to sell goods at a profit.

Q. And did you also tell him that you would co-operate with the jobber with respect to assisting the jobber in procuring the customary price that prevailed in Philadelphia?

A. I don't get that.

Mr. SMITH. Repeat that question.

[Question repeated by stenographer.]

A. I cannot remember the conversation because I don't remember when it occurred.

Q. We are trying to get the substance of the thing.

A. Well, the substance of my conversation to any jobber who came in would be that we would be glad to assist him in getting a profit.

Q. And after your circular and after your instructions were issued to your field men, did you tell jobbers who visited you that you would co-operate with them in seeing to it that they would be able to sell at the discounts prevailing in their territory?

A. I think the conversation usually took that form, that we would be glad to help you to maintain—

Q. The customary price?

780 Mr. PARKER. Let the witness answer.

A. No; the satisfactory condition.

Q. And a satisfactory condition, I think you stated, had nothing to do with it except in so far as the jobber was concerned, you left it to him to determine what would be the satisfactory condition?

A. No; not at all, not at all; the satisfactory condition was one that worked for the benefit of our company and varied in different localities.

Q. That is, you described the condition as being satisfactory when it did not create dissatisfaction among your customers?

A. That is one of the reasons; yes.

Q. Well, that is what you called a satisfactory condition?

A. Not altogether, because many customers were not satisfied when they could do business at a profit and make some money, they wanted to make more; now, those conditions we have nothing to do

with. It was only a condition which caused goods being sold without a profit so that those distributors of ours would be unable to continue, for any length of time, the distribution of our goods.

Q. But what the jobber in any given community was satisfied himself would be a satisfactory profit for him, you were reconciled with his opinion, were you not?

A. Not what he said was satisfactory, because he never is satisfied, and he would really—what provided him a margin of profit that would provide him with a living, so that he would still be
781 interested in our business, that was the satisfactory condition.

Q. Now, Mr. Hill—

A. Mr. Jobber did not regulate that; it was the conditions that regulated that.

Q. Now, to keep specifically as to Philadelphia, the maximum discount of 8 percent, and later 7 percent, fixed in Philadelphia, was never opposed by you, was it?

A. As a matter of fact, the discount of 8 percent I know about; I never heard of the 7 percent being made effective, but I cannot imagine anybody doing a jobbing business at a profit with a less profit than four percent.

Q. Well, you did not oppose the 8 percent maximum?

A. No, we did not oppose it; we had nothing to do with it.

Q. So that, in that respect, that maximum in Philadelphia was satisfactory to your company?

A. Yes, sir.

Q. So, continuing to be specific, did not you say to Mr. Eberbach and Mr. Krull, or to either of them, that you would assist them or co-operate with them in selling at a discount of not greater than 8 percent?

A. I certainly did not.

Q. What did you say?

A. The most—of course, I am not repeating recollection of a conversation—but the most that I said to either of those gentlemen, or anyone else, was that we would assist them in securing a satisfactory profit on the goods.

Q. Now the word "satisfactory" is the one word we seem
782 to be at odds about; when you use the word "satisfactory" do you mean satisfactory to the jobber?

A. Satisfactory to the American Tobacco Company.

Q. What do you say as to the jobber?

A. If it is satisfactory to the American Tobacco Company, it is satisfactory to the jobber.

Q. Now, Mr. Hill, the sub-jobber, as you have defined him, was not only a dealer at wholesale in tobacco, but also retail, was he, as a matter of fact—

A. I did not hear your question.

Q. I will put it this way: As a matter of fact, did you know that your direct customers also conducted a retail business?

A. Yes; oh, yes; a great many did.

Q. So that in that respect a sub-jobber is not different from a jobber—I am saying in that respect?

A. I do not know what you are really trying to get at, because—

Q. Well, you were distinguishing between the jobber and the sub-jobber.

A. Well, the difference between the jobber and the sub-jobber lies in the fact that we sell one and do not sell the other; that is the difference.

Q. The only difference is that the sub-jobber does not buy direct from the manufacturing company, and the jobber does?

A. That applies to some jobbers, some jobbers have retail stores.

Q. I am not talking of his re-sales; I am talking of his purchases; the sub-jobber does not buy directly from the manufacturer; whereas the jobber does?

A. The sub-jobber does not buy direct from us.

783 Q. Well, as far as your classification goes, you classify the jobber as the wholesaler who buys directly from you, and you classify the sub-jobber as the wholesaler who purchases from your customer?

A. Yes, sir.

Q. Now, let me ask you about the observation you were passing on American Tobacco Company's Exhibit No. 5; I think you differentiated between the prices—

Mr. PARKER. That is the circular?

Mr. SMITH. Yes, sir.

Q. Does the price the jobber would pay for the goods, as distinguished from the price the retailer would pay for the goods, if the sub-jobber got the benefit of the offer in the circular. Now, do not you think, and isn't it a fact, that if the sub-jobber bought from the jobber under that deal and re-sold to the retailer, he would not get all of the difference, but that it would be dissipated in some form or other in the transaction?

A. If the sub-jobber were to buy that deal and get the benefit of these free goods, he would have an advantage over the customer that bought direct, because he would sell the Sweet Caporal little cigars—

Mr. PARKER. Sweet Caporal cigarettes.

[Witness continues] Sweet Caporal cigarettes, which are in
784 demand, without insisting on the carton of "111" being placed in the retailer's store.

Q. But the sub-jobber does not buy your products at as good terms from the wholesaler, from your jobber, as your jobber does from you?

A. Lord knows, sometimes he does.

Q. But usually he does not?

A. Well, there must be some small difference, I would imagine.

Q. In other words, your products cost the sub-jobber more than they cost the jobber?

A. Well, I would not say that.

Q. Well, that is usually, generally so, isn't it?

A. Well, then put it that way; ordinarily that happens, but I have known sub-jobbers to buy goods just as cheap as the jobber.

Q. Those are—

A. And in any event, the difference is very small, as a rule.

Q. Now, you said under cross-examination that there was no way you knew by which you could assist the sub-jobbers of Philadelphia.

A. Did I say that?

Q. I understood you to say that.

A. No way that I could assist the sub-jobbers? I don't remember saying it; that is all.

Q. Well, if you are asked that question now, what would you say?

A. Put the question, please.

Q. Was there any way, in October, 1920, or in November, 1920, when you received a letter from the Philadelphia sub-jobbers, known as commission's Exhibit No. 13, in which you could have helped the sub-jobber?

785 Mr. PARKER. I suggest that if there is any purpose of asking the witness this, the witness has already testified that he did not receive that letter.

A. I did not receive that letter, but, as a matter of fact, if I had received that letter, and if that file would be placed before me, I could not have told how I could help them.

Mr. SMITH. The question, Mr. Examiner, was not upon the receipt of the letter, but on the question of whether he could have helped the sub-jobber.

Mr. PARKER. He said had he received the letter—

Mr. SMITH. Well, I did not understand that.

Q. Mr. Hill, do you know that the maximum discounts or the customary discounts in Philadelphia in 1920; that is, 8 per cent, was given by the Philadelphia jobbers to all of the customers, irrespective of the quantities their customers purchased?

A. I don't know anything about it, but I understood that was the greatest discount they would give to any one of their customers. I do not presume for a moment that all of the people in Philadelphia got that discount.

Q. Now, don't you know, didn't you hear, that that maximum discount was given by the jobbers of Philadelphia to all of their customers, irrespective of the quantity those customers
786 purchased?

A. I never said that the maximum discount was given to all of the customers. I understood the maximum discount they would give to any of their customers was 8 per cent.

Q. But you do not understand that they sold, as one witness stated, to a bootblack establishment, at the same discount they sold to a large retail store?

A. Well, I understood that they would do it, but I don't think they always did it; I don't believe they did.

Q. Well, assuming that they did allow the maximum discount of 8 per cent to the smallest purchaser as well as to the largest purchaser, don't you think that the sub-jobber might have served a useful purpose and might have been entitled, because of his larger purchases, we will say, than a shoe shining establishment, to have received a better discount than the real small retailer?

A. That is our customers business.

Q. I am asking about your opinion?

A. I haven't got any.

Q. So that when you said, if you did say it, on your cross-examination, that there was no way by which you could have helped the sub-jobber in Philadelphia in 1920 and 1921, you did not take that phase of the Philadelphia trade situation into consideration, did you?

A. How do you mean take it into consideration? Did I think about it?

Q. Yes.

A. Of course, I thought about it.

Q. But I understood you to say that you have not thought of it in connection with the idea of assisting the sub-jobber?

A. I don't see how I could; we only sell one class of customers.

787 Q. Now, what did you say, do you think you could or could not help the sub-jobber in the latter part of 1920 and in 1921 by way of recommending or suggesting—

A. To whom?

Q. To the Philadelphia jobbers that he gave a better discount on the larger sales he made.

A. I would not think of doing it. It is none of our business.

Q. Now, you testified, Mr. Hill, that no reports made to you by the jobbers were acted on.

A. I beg your pardon, what I testified to was that the reports made by jobbers were investigated, not acted on.

Q. But when the reports of jobbers came in complaining that a competitor was selling at an unsatisfactory price, that report was investigated by your field force?

A. Well, the report usually came in, when such did come in, not that they were selling at an unsatisfactory price, but that they were giving so much discount. The word "satisfactory" never entered into it.

Q. In any event, the complaint was investigated?

A. Yes, sir.

Q. And a report made to you?

A. Yes, sir.

Q. Now, do I understand correctly that those constituted the one class of reports that were made to you direct?

A. Well, how do you mean, in response to our inquiries to our salesmen? How do you mean by one class of reports?

Q. Do I understand that whether or not you discontinued one of your accounts because you were not satisfied with the discount as your jobber was getting—

788 Mr. PARKER. Was giving, you mean.

Q. Was giving, was acted upon by you?

A. Now, I don't want to quibble—

Mr. SMITH. That is all right.

A. A report comes in that a certain person is selling goods that would make it impossible to do business at a profit. That report is sent out to men in the field to investigate conditions surrounding that territory. If he reports to us that so-and-so is selling goods at a price that prevents jobbers from making a living in that territory, we will cut him off.

Q. Now, I will ask you this question—

A. Don't you believe—

Q. Whether the determination to cut off was made by you?

A. Yes, sir; facts were submitted and I determined it.

Q. As to the discontinuance of accounts for other reasons, you did not pay any attention to them, somebody else acted upon them?

A. Yes, sir; it was mechanical.

Q. As to the discontinuance of accounts for other reasons, you did not pay any attention to them; somebody else acted upon them?

A. Yes, it was mechanical.

Q. What did you say was the reason, or did you give a reason, for the withholding of shipments to Feimany of Philadelphia?

A. I did not give you the reason, and I cannot tell you now what it was.

789 Q. Prior to 1920—strike that out. Do you know what the jobbers of Philadelphia were selling your products at prior to 1920?

A. No, sir.

Q. Don't you know that prior to the latter part of 1920, the jobbers in Philadelphia, for years, had been allowing 10 and 1?

A. I don't know anything about it. I would be very much surprised if that were so.

Q. Didn't you know the jobbers were, or had been, selling in Philadelphia your products at 10 and 1?

A. I don't believe it.

Q. And better than 8 and making—

A. When you say selling, I do not mean to say that they did not make an occasional sale, but that the jobbers in Philadelphia were selling our products less 10 and 1 during 1920. I don't believe it, that they were selling it, I would be very much surprised.

Q. Would you be surprised to learn that for a period of three or four or five years in Philadelphia, prior to 1920, the jobbers had been selling at the prevailing discount of 10 and 1?

A. I don't believe it.

Q. Do you remember from whom you got the information upon which you made the investigation of the Seider account?

A. No, sir.

Q. Was it from some jobber in Philadelphia?

A. I could not tell you; I really do not know.

Q. Did I understand you testify that the Murphy account, Murphy Brothers of Camden, was discontinued because of credit reasons?

A. Several times.

790 Q. What did you say the reason was in September, 1921?

A. I do not remember any particular date or incident.

Q. I show you a work-sheet of the American Tobacco Company, dated September 7, 1921, which has been read into the record in this proceeding, and I call your attention to the names of the accounts discontinued from your list of direct customers; in such list appears the name of Murphy Brothers. Will you look at that work-sheet and tell us whether it refreshes your recollection as to the reasons why the Murphy account was discontinued in September, 1921?

A. This is just a general statement about the conditions; the party that makes this up does it as a mechanical proceeding; it says sales reasons; that doesn't convey any specific reason to me.

Q. You are, however, refreshed by that sheet—

A. Yes.

Q. Of the names of customers whose accounts were discontinued for credit reasons?

A. Yes, and some that were discontinued for other reasons.

Q. Now, does that sheet refresh your recollection as to why the account of Murphy Brothers was discontinued at that time?

A. No, sir.

Q. Will you now say that on or about the time that letter was written, or that work-sheet was gotten up, the account of Murphy Brothers was discontinued for credit reasons or might it have been for some other reason?

A. It might have been another reason.

791 Q. And it was not a credit reason?

A. I don't say that; I don't know. Sales reasons and credit reasons are pretty closely allied, you might get them mixed.

By Mr. PARKER:

Q. You may mix reasons?

A. Mix reasons; yes. He might consider a reason as a sales reason, and it may be a credit reason.

By Mr. SMITH:

Q. Where did you get the information that Murphy Brothers had been selling at 10 and 11?

A. Repeat that, please.

Q. I say, where did you get the information that—from whom did you get the report that Murphy Brothers were selling at 10 and 11?

A. I can't tell you; I don't know.

Q. Did it come from the Philadelphia jobbers?

A. I still don't know.

Q. You testified on cross-examination that you did not advise Murphy Brothers to join the association; will you tell us what you did tell Murphy Brothers?

A. I certainly cannot.

Q. But you do state positively that you did not advise Murphy Brothers to join the association?

A. I certainly do, and, of course, this is not an active memory, I cannot tell you what I did tell Murphy, but I know I didn't tell him to join any association.

Q. Did you talk with Murphy about trade conditions in Philadelphia and Camden?

792 A. I may have talked to him about the war, I cannot remember.

Q. Do you remember testifying on your cross-examination an observation of the advantages that jobbers might obtain by conferring with one another?

A. I don't know as I put it just that way.

Q. Well, probably you are correct, you didn't put it that way—

A. Did I?

Q. Don't you remember suggesting that there was—

A. I remember suggesting that there was a real advantage in people talking things over.

Q. And I think you mentioned that one of the causes, among others, of dissatisfaction in the jobbing trade was due to the fact, if my recollection is good, that a salesman of one jobber would say something about his employer's competitor, and that if the jobbers got together once in a while, those evils could be corrected; do you remember stating something to that effect on your cross-examination?

A. That is practically correct; yes.

Q. Now, are there any other advantages which jobbers might secure to themselves by getting together and conferring?

A. I don't know what you mean by that. I cannot imagine people getting on good terms with one another but what there are a great many advantages that arise from it.

Q. You know one of them is the possibility of an agreed price, isn't there?

A. Oh, well, that is your statement; it is not borne out by the facts.

793 Q. I say, that is a possibility?

A. I don't know whether it is or not. I don't think you can get a body of jobbers that would agree to a price situation and maintain it, to save their souls.

Q. Do you think you could get them together to agree upon one?

A. I don't know about that, I never tried.

Q. Well, you know that in some localities they did get together and agreed upon a price?

A. I don't know how close they got together, I really don't know.

Q. Well, you knew that in Philadelphia the discounts allowed by the jobbers changed from about 10 and 2 to 8?

A. Yes, and I doubt very much whether it was maintained at 8. I would bet a big apple it was not.

Q. Did I understand you correctly, on your cross-examination, to say that the business of the American Tobacco Company, in your opinion, was benefitted by price-cutting?

A. I don't know whether you would call it price-cutting or not. It is benefitted by low prices.

Q. By low prices to whom, Mr. Hill?

A. Eventually to the consumer, but all along the line, but not too low.

Q. Well, then, there is a limit to the price-cutting which, in your opinion, will benefit the American Tobacco Company?

A. Well there is a limit to the low prices at which goods should be sold, and if those prices do not pay a profit, or give a living to the people who are distributing it, it is a bad thing for the business.

794 Q. Well, some of us understand price-cutting to mean price-cutting without limit; when you speak of price-cutting to be a benefit to the American Tobacco Company, you don't mean that kind of price-cutting?

A. I don't think—I did not mean to say that price-cutting was a benefit, I meant to say that low prices were an advantage. There is quite a distinction, Mr. Smith. I do not mean to be technical at all.

Q. What is the distinction?

A. The great difference between low prices and price-cutting is that low prices are a good thing and price-cutting is injurious, is a disturbing thing.

Q. Well, then, do I understand you, that you mean to say, or you now say, that low prices are a benefit to the American Tobacco Company, but that price-cutting is not?

A. You are just using words, because—what do you mean by price-cutting? If I am going to answer your question, I have to know what you mean by price-cutting.

Q. Well, let us have what you have in your mind about that.

A. Nothing at all. I cannot answer your questions unless you tell me what you mean.

Q. First of all, you say that low prices you consider a benefit to the American Tobacco Company?

A. Yes, sir.

Q. Now, that is correct?

A. Yes, sir.

Q. As to price-cutting, I think you testified price-cutting as to—

A. Not at all, I would like to know what you mean by price-cutting.

Q. Well, if a retailer sold at less than your list prices, would you call that price-cutting?

795 Mr. PARKER. A retailer sell at less than list prices?

Mr. SMITH. That is what I said.

Mr. PARKER. There is no list price governing a retailer. Advertised prices, I suppose.

The WITNESS. I beg your pardon.

Q. I say, if the retailer sold at less than your list prices, would you consider that price-cutting?

A. Not necessarily.

Q. Why wouldn't you?

A. Why should I?

Q. Well, I am asking you why you would not.

A. I don't know exactly why, I would not necessarily.

Q. Well, now, do I take it that you mean to say that in some cases you would and in other cases you would not?

A. Exactly.

Q. Tell us the cases in which you would consider it and the cases in which you would not?

A. You will have to give me a case and I will tell you; on the other hand, I can not give you any specific cases, I have none in mind.

Q. Well, you say, Mr. Hill, that there are some cases where you would consider that if the retailer sold at less than your list prices he would be selling at cut prices, and in other cases you would not consider him to be selling at cut prices?

A. I still do not understand what you mean by cut-prices.

Q. Well, by lower than the list?

A. What list have we got? The only list that I know anything about is the list at which we sell our goods to our customers.

796 Q. Well, that is the list at which the retailer re-sells?

A. We have no list that we give the retailer.

Q. Well, your list prices are the prices upon which all of your sales to the jobber are based, in other words—

A. They are not based on it, they are it exactly, our list is the exact price at which we sell the jobbers, not based on it.

Q. Well, you sell to jobbers at 10 per cent off list price, do you not?

A. No, sir.

Mr. PARKER. Now, let me straighten you out. The American Tobacco Company has, since 1921, and in the last six months, adopted a flat price basis.

The WITNESS. We do not give any discounts.

Mr. PARKER. But if you are dealing with an—

The WITNESS. We gave ten per cent then.

Q. Now, prior to the time that you went to a flat price, you had what you called a list price?

A. Yes.

Q. And you sold the jobber your products at that list price, less 10 per cent?

A. Yes, sir.

Q. And then 2 per cent for cash within 10 days, I think?

A. Yes, sir.

Q. Now, when did you change from that system to the flat price?

A. About four, five months ago.

Q. Now, don't, as a matter of fact, the jobber in his re-sales to his customers, base his price upon your list price and a discount?

A. The jobbers did, yes.

797 Q. Now, wasn't your list price the prices at which the products were usually sold by the retailer?

A. No, sir.

Mr. PARKER. By the retailer you mean to the retailer?

The WITNESS. No, he means by the retailer.

Mr. PARKER. No.

The WITNESS. That is what he has been asking me all the time.

Mr. PARKER. The price to the retailer is a different price entirely to the list price.

Q. What relation, if any, was there between the price charged by the retailer and the list price of the American Tobacco Company prior to the time you went to the flat basis?

A. Well, it was usually twenty percent more than he paid—than the list price to the jobber, or rather I think that the list price to the jobber was 20 per cent less than the retailer charged for his goods.

Q. Now, we are trying to find out, and what we are after just now, Mr. Hill, is the difference between the occasion, whatever the circumstances were, where you call a given price a cut-price and the occasion where you would say it was not a cut-price.

A. I could not tell you.

Q. You cannot tell me?

A. Not unless a specific case is given each time, I think I could explain my position.

Q. Now, Mr. Hill, if, as in Philadelphia, the maximum
798 price prevailing for the jobbing trade to its customers was 8 per cent discount from your list price, what would you say as to whether this jobber came within the definition of cutting price, if a jobber in Philadelphia sold at 10 per cent off the list, how would you classify him?

A. I would say he was hurting our business, we would not want to sell to him.

Q. Would you say he was a cut-price jobber?

A. I think I would.

Q. Is he one of the parties you would call a demoralizer?

A. Yes, sir; he would be.

Q. When you used the word "demoralizer" in these letters—in that letter to Finch, or when it was used, I don't think you used it, commission's Exhibit 32, to mean cut-price jobbing.

A. I don't know what I meant by cut-price jobber or demoralizer, it was a customer of ours who was injuring our business. Now, that might come from a number of reasons; if he made it unprofitable for our regular customer to do business in a given locality, we considered that he was doing our business an injury and we did not want to sell him.

Q. And you would call him a demoralizer?

A. You are asking me to define the English language. I don't know whether I would call him a demoralizer or not; maybe I did call him a demoralizer, but that don't mean anything.

Q. Well, when you did use the word "demoralizer"—

A. I don't remember, if you will show it to me—I probably did but I don't remember any particular case.

Mr. SMITH. That is all.

799 Recross-examination by Mr. PARKER:

Q. Mr. Hill, in response to a question on redirect examination, you said, of course, to my recollection, that if the profit of jobbers in a given community was satisfactory to the American Tobacco Company, it was satisfactory to the jobber. Did you mean that?

A. Well, I meant—yes; I meant it in this way: A price that is satisfactory to the American Tobacco Company is a price that permits the people who are distributing our goods to make a living, and if the people that are distributing our goods are making a living, it is satisfactory—the conditions are satisfactory to them.

Q. Well, is it always satisfactory to the jobber?

A. He always wants—

Q. By merely making a living?

A. He wants to make more, of course.

Q. Well, then, you do not say that if the price was satisfactory to the American Tobacco Company, it is necessarily satisfactory to the jobbers, do you?

A. No; not to be technical. Of course, I do not suppose it is exactly that.

Q. What you meant to say, Mr. Hill, was if the price was one that the jobbers were satisfied with, and their facilities were unimpaired, it was satisfactory to the American Tobacco Company?

A. I apologize for my bad use of the English language.

Q. In response to questions on your cross-examination you testified as to various things which you did not tell Mr. Eberbach and

800 Mr. Krull. What makes you certain that you did not tell them those things, that I need not repeat?

A. I could not tell them anything to do anything or not to do anything that was against our policy, and what I did not tell them were things that I would not have told anybody.

Q. And therefore you are sure that you did not tell them?

A. I know I did not tell them.

Q. You said on your direct examination that you did not recall the conversations, as a matter of memory, that you had with these gentlemen, either single or together?

A. I did not.

Q. On your redirect examination you appear to have stated some things that you did say to those gentlemen. Do you recall saying the things, and if not—

A. I don't remember.

Q. Why did you leave the impression that you said certain things?

A. I don't remember the conversation that occurred; I don't believe that I said that I remembered telling them certain things; I think what I did say was that if I did tell them anything, it probably would have been along certain lines.

Q. You have no recollection of telling them anything?

A. I have no recollection of the conversation.

Q. Now, Mr. Hill, let us try to straighten up this matter of list prices and retailers, and so forth. In 1921 the American Tobacco Company was selling its goods at a list price, less 10 and 2, 10 a trade discount and 2 a cash discount to its jobbers. In some sections of the country did jobbers get from the retailers the full list price?

A. Yes, sir.

801 Q. In any section of the country did the jobbers get from the retailers more than list price?

A. Not that I know of, although that may have happened.

Q. Were these lists of the American Tobacco Company given general circulation and publicity?

A. No, sir; they were confined to our customers, but other people got them, but we mailed them to our customers.

Q. But as a practical matter, from your knowledge of the tobacco business, would it be impossible for the jobber to any extent to get a price, excepting list price?

A. No, not to any extent.

Q. Therefore, this method of selling goods limited, in the sections of the country, the jobbers profit to 10 per cent, did it not?

A. Practically; yes, sir.

Q. In many sections of the country that are sparsely settled or otherwise expensive to operate, is a 10 per cent profit an excessive profit to jobbers?

A. I would not think so.

Q. Therefore, as long as you sold at a list, with a trade discount, you never had, during that period nor during a late period a trade discount of less than 10 per cent, did you?

A. No, sir—say that again.

Q. Now, during those years, and during recent years, you have not had a trade discount of less than 10 per cent?

A. Well, I think we had a trade discount about that time in New York City of 7 per cent.

Q. That was in New York City?

A. In New York City.

802 Q. Now, the retailer buys from the jobber at list, or at list less a discount, doesn't he?

A. Yes.

Q. What is the customary—

A. Excuse me. He don't always buy less a discount. Sometimes he buys at a lower price than list, but that price is not a discount.

Q. It does not make any difference in result whether it is a lower price than list or discount from the list?

A. Correct.

Q. In either event, it is, in effect, a list price less a discount, or it is the same thing as a lower than the list price?

A. Than the list.

Q. Now, from your experience in the trade, what is the customary profit that retailers make on their sales?

A. They usually make 20 per cent.

Q. On the selling price?

A. On the selling price.

Q. Has that been the result of agreement between retailers?

A. Not at all.

Q. How is that brought about?

A. Why, I think—take ourselves, I will only speak for ourselves—we base our list price on the fact that we believe that a retailer should have 20 per cent and the jobber should have 10 and 2 and that we are entitled to the balance.

Q. And when the American Tobacco Company gets out a new product—

A. Yes.

Q. What is the first factor that you take into account, the jobber price, the retailer price, or the consumer price?

A. The consumer price.

803 Q. And at this time, in 1920 and 1921, as I understand you, in fixing your list price you worked back from the consumer price?

A. Yes.

Q. And therefore if the consumer was going to pay a cent apiece for cigarettes or \$10 a thousand, to illustrate, you had a list price of approximately \$8?

A. We would make it \$8, less 10 and 2.

Q. That made profit for the retailer, making a profit of 20 per cent on his billing price, and for the jobber making a profit of 10 per cent on his selling price?

A. Yes, sir.

Q. And that conduct of the American Tobacco Company fixed the maximum profit that these people could make?

A. Yes.

Q. Now, as a matter of fact, retailers frequently sell a 20-cent cigarette at less than 20 cents, don't they?

A. Very often.

Q. That is a sporadic lowering of price, or price cutting, whichever you may see fit to call it?

A. Yes.

Q. And as a matter of fact, jobbers frequently make a profit of less than 10 per cent?

A. Yes, sir.

Q. And that is lowering of price, or sporadic price cutting, whichever you may call it?

A. Yes, sir.

Q. Now, as I understand, it is the policy of the American Tobacco Company, or was at that period, to pay no attention to, but rather enjoy those sporadic price cuttings, so far as it did not injure your business?

A. That is correct.

Q. And what you meant, so far as I understand, in answer
804 to Mr. Smith's question on redirect examination, is that as a general principle the manufacturer is benefitted if the consumer gets his goods at as low a price as possible?

A. I think so.

Q. And that is because of the economic law that the lower the price the greater the demand?

A. Yes, sir.

Q. But you say that that has its limit?

A. Surely.

Q. And if that firm is brought to a point of making nothing, or the retailer brought to a point of making nothing, then it is not of any benefit to the American Tobacco Company, because it blocks the channels of reaching the consumer?

A. I think it is injurious to the business.

Q. Did you, as directing the policy of the American Tobacco Company, ever consciously invite or cooperate in, in the making or carrying out of any agreements among jobbers or retailers that would limit their right to sell your products for what they pleased?

Colloquy between examiner and counsel

MR. SMITH. Mr. Examiner, I object to that question.

EXAMINER McCORKLE. Let me hear that question.

Question repeated by stenographer.

MR. SMITH. Now, Mr. Examiner, I object to this question because it calls for a conclusion; it calls for a conclusion of two kinds, a conclusion of fact and a conclusion of law.

805 EXAMINER McCORKLE. I am ready to rule on it. I think it is an improper question. You are asking him to decide this whole case.

MR. PARKER. I do not know that it is anything but a convenience, Mr. Examiner; but it seems to me that it is a very vital question; it is not asking him for anything except a negative. He is charged with having, or the American Tobacco Company is charged with having, aided or cooperated in the formation or conduct of an illegal agreement. Now, we can ask him about a particular incident, we can ask him about this place or we can ask him about that place; but it seems to me that this question does not call for a legal conclusion; it calls for what he did not do, and I do not see how else we can get the statement as to what he did not do—

EXAMINER McCORKLE. Well, ask him any particular thing that he did not do.

Mr. PARKER. Well, I have asked him that; I have asked him, did you, as directing the American Tobacco Company and its policy, ever cause it to cooperate in any agreement—

Examiner McCORKLE. Well, right there now you are asking for a conclusion; you are asking—

Mr. PARKER. Well, may it please your honor, if a man is in charge—

806 Examiner McCORKLE. I think it is improper.

Mr. PARKER. I know that you want to be of aid in getting at the fact. Can you state how to make it better?

Examiner McCORKLE. Now, I am not going to state that. I think it is an improper question.

Mr. PARKER. Is it possible to ask an improper question by asking a man if he ever committed a murder?

Examiner McCORKLE. Well, I have ruled on it. Change your question.

Mr. PARKER. The American Tobacco Company excepts to the ruling just made, and states that it offers to prove by this witness that the American Tobacco Company has never, under his direction or with his approval, he being in charge of its affairs, aided in the formation of a group, cooperated in such or with such, of any competing jobbers or retailers, who had made, or contemplated making, any arrangement or agreement that interfered with their liberty to dispose of goods they had bought as they saw fit. It is proposed by such answer to negative the allegations of the complaint, wherein such allegations are made.

Examiner McCORKLE. I still think it an improper question and should be ruled out, but I will let the witness answer it because it is a question that will be reviewed later on; that is my view of it.

807 A. I never have.

Mr. PARKER. That is all.

Mr. SMITH. I have nothing further.

(Witness excused.)

GEORGE W. HILL was thereupon called as a witness, and having been duly sworn, testified as follows:

Direct examination by Mr. SMITH:

Q. Mr. Hill, you are one of the vice presidents of the American Tobacco Company, are you not?

A. I am.

Q. How long have you been vice president?

A. If my recollection serves me, since 1914, I think.

Mr. PARKER. 1911.

The WITNESS. 1911.

Q. What department of the business do you have charge of?

A. Sales.

Q. Have you had charge of the sales since 1911?

A. No.

Q. How long have you had charge of the sales?

A. Since 1914.

Q. Who is O. K. Parker, 411 Rhodes Building, Atlanta, Georgia?

A. Mr. O. K. Parker is what we term a sales manager.

808 Q. What is his district?

A. He has section No. 5, with headquarters in, now, St. Louis, operating from virtually the Mississippi River west to the Rocky Mountains.

Q. What are his duties?

A. He is the head of the sales department of the American Tobacco Company in that section.

Q. In 1920 was Mr. Parker in the South, before he went West?

A. He was.

Q. And what position did he have in Atlanta?

A. Assistant sales manager for section No. 3, which is the southern section.

Q. Who is your present sales manager?

A. Mr. Riggio. We have nobody with an official title.

Q. Mr. S. H. Harris was sales manager in 1920, was he not?

A. In that section, and is to-day.

Q. Was Mr. Harris connected with the New York office of the company in 1920?

A. As he is to-day.

Q. When circular No. 2783 was issued by the American Tobacco Company, or shortly thereafter, did you not get up a series of form letters to be used in connection with that circular?

A. Mr. Smith, I would like to answer that, and if you don't mind, I would like to see the circular 2783; I think I remember exactly what circular it was.

(Mr. Smith hands witness circular.)

Mr. SMITH. Mr. Examiner, I have here a number of form letters which I will ask to have marked for identification.

809 (Letters referred to received and marked "Commission's Exhibits 33, 34, 35, 36, 37, 38, and 39," for identification.)

Mr. SMITH. And I have also a letter, written September 15, 1921, to Mr. George W. Hill, this witness, by the sales department, which I ask to have marked "Commission's Exhibit No. 40," for identification.

(Paper referred to received and marked "Commission's Exhibit 40," for identification.)

Q. Mr. Hill, I show you this paper which has been marked "Commission's Exhibit 33," for identification; can you tell us, please, what it is?

Mr. CALDWELL. Mr. Examiner, I would like to put the same objection on the record to this witness' testimony as to the preceding witness' testimony, that it is not binding on the Lorillard, and ask that it be generally received without being repeated after the various questions.

Examiner McCORKLE. So I understood.

A. A series of form letters in answer to replies received from our customers to the circular 2783.

Q. Now, when you received from one of your customers a letter stating that they had received your circular No. 2783, which is known as Commission's Exhibit No. 10, or in some cases you sent those customers a reply in the form and substance of Commission Exhibit No. 33 for identification, is that correct?

A. Yes, sir.

Q. Did you also use the form which is shown by Commission's Exhibit No. 34 for identification for the same purpose?

A. I believe so.

Q. Will you tell us what Commission's Exhibit No. 35 is?

A. It is the same, I think.

Q. That is, this is a form of letter which you got up to answer your jobber customers when they wrote in inquiring about your circular No. 2783?

A. Yes.

Q. I show you Exhibit No. 37 for identification. Will you tell us what that paper is?

A. The same thing—oh, excuse me. That is a form letter which we forwarded to such customers as wrote us telling us of any conditions existing in their territory in regard to prices which disturbed them.

Q. Now, I show you the paper known as Exhibit No. 38 for identification. Will you tell us what that is?

A. That is the same letter, for the same purpose, excepting that sometimes complaints would be made to us of a general character which conveyed no information of any sort and meant nothing to us, unless we heard further from our customers.

Q. Now, the difference between Exhibits No. 36 for identification and No. 38 for identification seems to be that, as to 38, you ask for more specific information?

A. Correct.

Q. Is that correct?

A. Correct.

Q. Now, I show you the paper that is known as Commission's Exhibit No. 39 for identification, what is that?

811 A. As it is headed it is a form letter to be written to field managers on receipt of jobbers' complaints regarding demoralization of price conditions.

Q. In other words, when you received a complaint, you acknowledged receipt of the letter by using the form shown on Exhibit 37 for identification, or by using the form shown in Exhibit 38 for identification, and wrote to your field sales manager directing an investigation, as is shown in Exhibit 39?

A. By our own men.

Q. Is that correct?

A. Yes, correct.

Q. What is this paper which has been marked "Commission's Exhibit No. 40" for identification, Mr. Hill?

A. It is a letter written to me by Mr. Harvey, explaining the letters that we have just discussed, as at that time I was absent on the Pacific coast.

Q. Now, those four which he mentions in his letter—that is, his letter being Exhibit 40 for identification—is the paper which has been marked here "37" for identification?

A. Yes, sir.

Q. And the paper to which he refers in Exhibit No. 40 for identification as 4-B is the paper marked here "Commission's Exhibit No. 38" for identification, is it not?

A. Correct.

Q. And the letter 5 to which he refers in Commission's Exhibit 40 for identification is Commission's Exhibit No. 39 for identification; is that correct?

A. It is.

Q. Who is Mr. J. K. Fletcher, of the American Tobacco Company?

A. Mr. J. K. Fletcher is sales manager of section 4.

812 Q. And where is that located?

A. The headquarters of the section are in Cleveland; Mr. Fletcher's headquarters are in New York.

Mr. PARKER. Is where?

The Witness. Cleveland.

Q. Has Mr. Fletcher's position changed since September, 1921?

A. It has.

Q. Where was he in 1921?

A. He was in the State of Ohio as salesman, or assistant to the position that he now occupies of sales manager.

Q. Who is O. W. Peaslee?

A. Mr. O. W. Peaslee was at that time sales manager for section 4; he has since been succeeded by Mr. Fletcher.

Q. Where is Mr. Peaslee now?

A. He is at present on the Pacific coast.

Q. What is his address; can you give it to us?

A. No. 1 South Park Street, San Francisco.

Q. Who was G. B. F. in your organization in 1921?

A. I think it would be Mr. George B. Freitag.

Q. Where is he located?

A. In Chicago; I don't know his office address.

Mr. SMITH. Mr. Examiner, I have here three papers, one of which is a copy from Mr. Hill, the witness, to Mr. Harvey, dated June 3, 1921, mentioning two enclosures. One a circular of Liggett

813 & Myers, dated May 17, 1921, and the other a circular by P. Lorillard Company dated May 25, 1921. I ask that they be marked 41, 42, and 43, respectively, for identification.

(Papers referred to received and marked "Commission's Exhibits 41, 42, and 43," for identification, respectively.)

Mr. SMITH. Mr. Examiner, these papers which have been marked, respectively, "Exhibits 41, 42, and 43," are copies taken by the representatives of the commission from the files of the American Tobacco Company. Now, whether I gave Mr. Walsh a note of this letter and these two circulars, so that he might verify or check up on the letters and things I took from the files of the American Tobacco Company, I do not remember. I had an agreement, Mr. Walsh and I, that there would not be any objection to these after he checked them up and found out they were accurate, as to competency.

Mr. CALDWELL. I don't know what this circular 43 is he is referring to.

Mr. CALDWELL. Whether it is a true copy or not, I made no stipulation in reference to it and I object to it in any way whatever as binding on the Lorillard at this time.

Mr. SMITH. It has not been offered, as I understand.

814 Examiner McCORKLE. Do you include that?

Mr. WALSH. No; but I will say now that, subject to the verification—

Examiner McCORKLE. But you do include the Lorillard circular?

Mr. SMITH. Yes.

Examiner McCORKLE. With Mr. Walsh?

Mr. SMITH. Yes, indeed.

Mr. PARKER. Which was a copy of what purported to be a Lorillard circular and filed with the American Tobacco Company?

Mr. SMITH. And transmitted in a letter from Mr. Hill to Mr. Harvey. Mr. Examiner, I offer in evidence this letter dated June 3, 1921, from Mr. Hill, vice president, to Mr. Harvey. This letter has been marked as exhibit No. 41 for identification, and I ask that it be marked "Commission's Exhibit No. 41." I also offer in evidence Exhibit No. 42 for identification, which is a circular of Liggett & Myers, dated May 17, 1921, and referred to in the letter known or marked Exhibit 41 for identification. I also offer in evidence, Mr. Examiner, paper which has been marked "Commission's Exhibit No. 43" for identification. This paper is a copy of circular No. 1350 of P. Lorillard Company to its customers, dated May 28, 1921, and being also the copy of the circular of Lorillard & Company referred to in Commission's Exhibit 41 for identification.

815 Mr. WALSH. The American Tobacco Company, subject to verification, makes no objection but what the papers offered are copies, but it does object to the receipt of the papers in evidence because they are irrelevant and immaterial to the issues in this case or proceeding.

Mr. CALDWELL. The attorney for the Lorillard Company objects to these papers on the ground that the letter of Mr. Hill dated June 3, being exhibit for identification No. 41, is in no way binding upon the Lorillard Company, and further objects to the exhibit for identification 42 on the same ground, and objects to Exhibit No. 43 on the ground, first, that it does not appear to be an original

paper; second, on the ground that it does not appear that this circular was in anywise sent to the jobbers in Philadelphia, or that vicinity, or that it was sent out by the Lorillard Company, and it does not pertain to any of the issues in this action, and that it is irrelevant, incompetent, and immaterial, and not binding upon the Lorillard Company.

Examiner McCORKLE. I will admit the exhibits.

(Papers referred to received in evidence and marked, respectively,

"Commission's Exhibits 41, 42, and 43.")

816 Mr. CALDWELL. I move to strike out the Exhibit 43 as against the Lorillard Company on the ground that it is not proved to be a copy, it is not proved to be sent out by the Lorillard Company, and there is no evidence that it was sent out to any of the vicinity of Philadelphia or Pennsylvania or any place embraced within that territory, and has nothing to do with the issues in this action, and that it is irrelevant, incompetent, and immaterial to all the issues in this action and in no way binding upon the Lorillard Company.

Examiner McCORKLE. Motion overruled.

Q. Have I asked you previously where Mr. Harvey was located?

A. No, sir.

Q. Who was Mr. E. A. Harvey?

A. Mr. E. A. Harvey was virtually my secretary.

Q. Where is he now, Mr. Hill?

A. He is at present field sales manager in New York City.

Q. I notice at the top of this Exhibit No. 41 there appear the words, in capital letters, "Copy of this letter sent to all sales managers." Did you send a copy of this letter, known as Commission's Exhibit No. 41, to all of your sales managers?

A. I don't remember, but I presume so.

Q. Would you say that you sent to all of your sales managers a copy of the Liggett & Myers circular No. D-413, known as Commission's Exhibit No. 42?

A. My letter so states.

817 Q. And did you also send to all of your sales managers a copy of the Lorillard circular 1350, which is known here as Commission's Exhibit 43?

Mr. CALDWELL. I object specifically to this question on the ground that it is in no way binding on the Lorillard Company, it is nothing sent out by the Lorillard Company, it does not appear where these parties had their places of business, and that it is irrelevant, incompetent, and immaterial.

Mr. McCORKLE. Note Mr. Caldwell's objection and proceed to answer the question.

A. I presume so; it is so stated in the letter.

Q. How many sales managers, all told, did the American Tobacco Company have in June, 1921?

Mr. CALDWELL. Same objection.

A. Six.

Q. And is there a sales manager for each section of the American Tobacco Company?

A. Yes.

Q. How many sections—

A. There are some technicalities in that connection—

Q. Does the American Tobacco Company, for its convenience, divide the United States of America into a number of sections?

A. It does.

Q. And those sections are six in number, I understand?

A. They are.

818 Q. Each one is headed by a man who holds the title of sales manager?

A. It is.

Q. And to each one of these sales managers went copies of the Leillard and Liggett & Myers circulars?

Mr. CALDWELL. Same objection.

A. The letter so states.

Q. Mr. Riggio, I think you said, Mr. Hill, was the sales manager in New York in 1921?

A. Correct. I don't want to be technical, it does not apply to New York alone; that is what we term section 1, New England and New York.

Mr. SMITH. I asked you that because it appeared from the letter-head that it was sent from New York City. I offer in evidence, Mr. Examiner, a letter dated July 8, 1921, sent by Mr. V. Riggio to one Mr. F. Faulk, and ask that it be marked "Commission's Exhibit No. 44."

Mr. CALDWELL. There is no proof that that is a copy. If that is admitted, we might as well admit anything.

Examiner McCOCKLE. He has to verify it.

Mr. CALDWELL. He has to verify it; I have not promised to verify it.

Examiner McCOCKLE. Yes; he has to verify it, I think.

819 Mr. PARKER. You offer that in evidence, do you?

Mr. SMITH. Yes.

Mr. PARKER. The American Tobacco Company makes no complaint that that is a copy and not the original, and we are willing to waive the objection that it is not an original, with the understanding that it is subject to verification with the original, but the American Tobacco Company does object that it is irrelevant and immaterial to any question in this proceeding; it does not appear that it has anything to do with any Philadelphia situation whatsoever.

Examiner McCOCKLE. I will admit it. Note Mr. Parker's objection on the record.

Mr. SMITH. I ask that this paper be marked "Commission's Exhibit 44."

Mr. PARKER. I think the examiner would have to examine it before admitting it. This is not a letter written by Mr. Hill, but by Mr. Faulk.

Examiner McCORKLE. I will admit it as a letter of the American Tobacco Company; it is signed as sales manager.

Mr. WALSH. Although we are sitting in New York, we are trying a Philadelphia case.

Examiner McCORKLE. Yes; but I will admit it.

(Paper referred to received and marked "Commission's Exhibit 44.")

820 Q. Mr. Hill, who is Mr. Faulk, mentioned in this letter?

A. I think Mr. Faulk is a field sales manager.

Q. And where was he located?

Mr. CALDWELL. For whom?

The WITNESS. American Tobacco Company.

Mr. PARKER. And where?

The WITNESS. New Jersey.

Q. Did you say Mr. Faulk was located in New Jersey?

A. Yes, sir.

Q. In 1921?

A. That is my recollection, although my recollection also is that in 1921 he was merely a division manager in New Jersey.

Examiner McCORKLE. Now, we will adjourn until ten o'clock to-morrow morning.

(Whereupon, at 4.30 o'clock p. m., adjournment was taken until November 1, 1922, at 10.00 a. m.)

821

Docket 886

NEW YORK, November 1, 1922.

Met pursuant to adjournment, 10.30 a. m.

Before George McCorkle, examiner.

Present: Parties as before.

GEORGE W. HILL resumed the stand and testified further as follows:

Direct examination (continued) by Mr. SMITH:

Q. Mr. Hill, I call your attention to the last paragraph in this letter of Mr. Riggio, known as commission's Exhibit No. 44, as follows: "We do not want to be a part of any organization whatsoever, but we will insist upon the maintenance of the prices that I suggested to you, as all jobbers with whom I come in contact advise me that this is the prevailing price in this community." State whether the policy of your company as outlined in that paragraph I have just read was the policy of the company in Philadelphia in 1921?

A. I do not know anything about that letter. I never seen the letter until you showed the letter to me. The policy of our
822 company in Philadelphia in 1921 was to be satisfied with jobbers selling at the prevailing prices in Philadelphia.

Q. Well, would you say that this paragraph, Exhibit No. 44 which I have just read, exemplified your policy in Philadelphia?

Mr. PARKER. I do not know that I understand the question. If it is understandable, I do not object to it, but there is a statement in there of "price I mentioned to you." Mr. Hill says he knows of no such price. I submit it is a very difficult question for the witness to answer. It contains so many things.

Q. Can you answer the question as it was put to you?

A. I think the answer I have already made answers.

Mr. PARKER. Let me inquire this: Is this purporting to be a letter written by Mr. Hill?

Mr. SMITH. No. Mr. Riggio.

Mr. PARKER. Mr. Hill stated he never saw it until yesterday.

Mr. CALDWELL. I did not get the exhibit number on that; is it 44?

The WITNESS. Yes.

Q. Was this part of the policy of the American Tobacco Company not to be a party of any organization, but did the American Tobacco Company insist upon the maintenance of a price in Philadelphia, which, according to the information which you got from jobbers, was prevailing in Philadelphia?

A. No, sir; we insisted on nothing.

Q. Mr. Hill, what is a drop shipment in the tobacco trade?

A. A drop shipment is a shipment of merchandise made directly from the manufacturer's factory or depot. In other words, warehouse; shipped to a retail dealer and billed by the manufacturer to a jobber and rebilled by the jobber to the retail dealer.

Q. Does the jobber collect from the retail dealer and remit to the manufacturer?

A. No, sir.

Q. How is the remittance made, direct from the retailer to the manufacturer?

A. No, sir.

Q. How is it made?

A. The manufacturer bills a jobber for drop shipments the same as he bills a jobber for merchandise for that jobber's stock, provided the drop shipment has first received the credit approval of the jobber, as to the retailer's credit. As to how the jobber bills the retailer in 999 cases out of a thousand the manufacturer does not know.

Q. But who does pay the manufacturer, the jobber?

A. The jobber pays the manufacturer.

Q. And the jobber gets his discount from—how is the jobber reimbursed; what profit does the jobber make on the transaction?

A. This may be surprising, but 99 out of a hundred of the drop shipments taken by the American Tobacco Company are sold to the retailer without any price at all. We do not know what price the jobber charges the retail dealer for his merchandise. Now, you would like the reason for that. Jobbers make different prices. Our men do not know the price that a jobber may charge. Therefore we sell by standard recognized brands only and only make

an allowance which is provided for in the face of a drop shipment; the jobber doing the billing, collecting his money, and making such profit as he desires.

Q. Well, at the time you were using a list price the jobber got ten and two off that list price, did he not?

A. Yes, sir. However, my statement holds good.

Q. You mean it holds good since the time you abolished the list price?

A. No, before. No prices were quoted—

Q. You mean no prices were quoted to the retailer?

A. Exactly.

Q. I show you a letter, copy of letter dated July 22, 1921, from Mr. Faulk to Mr. Riggio. You will notice in this letter paragraph: "If I understand Mr. Hill's letter correctly the jobber who wants to do business in the community where a certain price is charged must meet the price of that community, and if he does not do this he is to be taken off our direct list of buyers." State whether or not that understanding of Mr. Faulk in his letter to Mr. Riggio, dated July 22, 1921, was a correct understanding.

Mr. CALDWELL. Correct understanding of what?

Mr. SMITH. Mr. Hill's letter, of course.

825 A. It was not.

Q. Why was it not?

A. We never took a jobber off of our list because he sold at a higher price than other jobbers in a given community.

Q. Did you ever take a jobber off of a list because he sold for a lower price in a given community?

A. Ask me a specific instance and I can answer. We never took, to my knowledge, a jobber off our list exclusively because he sold at a lower price.

Q. Although that may have been one of the reasons?

A. That may have been a contributing reason.

Q. What do you say as to whether or not this paragraph from this letter, which I have just read, expresses a correct interpretation of your circular which is known here as Commission's Exhibit No. 10 in so far as this might apply to a jobber who would be selling at a price less than the price prevailing in a community?

A. I do not understand it as a correct understanding of our circular.

Q. Do you take it to be a correct understanding of your circular in the sense that I expressed it in my last question?

A. No, sir.

Q. Who is R. W. Richards, field sales manager of the American Tobacco Company?

A. Mr. Richards is field sales manager under Mr. O. K. Parker, inspector No. 5. I believe Mr. Richards has the State of Oklahoma and some other territory out there.

Q. Where is his office located?

A. I cannot tell you.

826 Mr. SMITH. Mr. Examiner, I have here a letter dated October 12, 1921, to C. A. Heyd, Richmond, Virginia, by H. Z. Ellis. This is one of the letters secured from the files of the American Tobacco Company, and I offer this letter and ask that it be marked "Commission's Exhibit No. 45."

(Marked "Commission's Exhibit No. 45.")

Mr. PARKER. That is objected to. It appears to have been written apparently from some one from one town in Virginia to some man in Richmond, Virginia, and it seems to me to be entirely irrelevant to a question regarding trade conditions in Philadelphia.

Mr. SMITH. This is a letter, Mr. Examiner, from Mr. H. Z. Ellis to Mr. C. A. Heyd, which tells of the investigation by the commission of the jobbers in the American Tobacco Company and the American Tobacco Company and the relationship between the American Tobacco Company and its jobbers. Underneath the signature on this letter appear the words "Mr. Beville, please note." Underneath that is the name "Heyd."

Mr. PARKER. I insist on my objection as to its being entirely irrelevant, and no proof of conditions prevalent in Philadelphia. It cannot for any reason have any relation as to that, and if the examiner will look at it he will see that.

827 Mr. SMITH. It goes to this, Mr. Examiner: The investigation of this condition in the tobacco industry seems to have commenced in this letter in October, 1921. The Philadelphia association was dissolved formally in the early part of 1922. The members of the association have testified and gave certain reasons for the dissolution of that association; this letter, I think, is admissible to show whether the reasons given by the Philadelphia jobbers for the dissolution of that association were all of the reasons that led to the dissolution of the association.

Mr. CALDWELL. Objected to on behalf of the Lorillard for the same reasons and on the same grounds and also because it is not binding, not connected, and not authorized by anybody representing the Lorillard.

The EXAMINER. I will admit it.

Q. Who is Mr. Heyd, of Richmond, Virginia?

A. Mr. Heyd is field sales manager in that territory for the American Tobacco Company.

Q. And do you know Mr. H. Z. Ellis?

A. I never heard of him.

Mr. PARKER. Then I raise another objection, that there is no connection of the American Tobacco Company with it at all. Mr. Ellis is not under oath here.

828 The WITNESS. I do not say he is not in the employ of the American Tobacco Company, but I never heard of him.

Mr. PARKER. I move to strike out the exhibit.

Mr. SMITH. I have here another letter dated October 21, 1921, addressed—

Mr. WALSH. We have not had a ruling on Mr. Parker's motion. The EXAMINER. Motion denied.

Mr. WALSH. Do I understand they can bring into the record letters of strangers, no party to the proceeding, in no way connected?

Mr. SMITH. I have here another letter dated October 21, 1921, addressed to Mr. C. A. Heyd, acknowledging receipt of the letter of H. Z. Ellis to Mr. Heyd, concerning certain other statements which of course appear on the letter itself. This letter I will offer and ask that it be marked "Exhibit No. 46."

(Marked "Commission's Exhibit No. 46.")

Mr. PARKER. I make the same objection.

Mr. CALDWELL. The same objection on behalf of the Lorillard as heretofore.

The EXAMINER. Same ruling.

Q. Mr. Hill, will you look at Exhibit No. 45 and Exhibit No. 46, please, and tell us of the connection between Exhibit 45 and No. 46?

A. I do not know Mr. Ellis. I do not remember ever having seen Mr. Ellis. Therefore the only connection that I can point out is that that appears in Exhibit No. 46.

Q. Is not Exhibit 46 a copy of a letter written by your sales department to Mr. Heyd, acknowledging receipt of the letter which is known as Exhibit No. 45?

A. It so appears.

Q. Did you notice in this Exhibit No. 46 the opening paragraph: "I beg to acknowledge receipt of letter of your Mr. H. Z. Ellis, under date of October 12th"?

A. Yes, sir.

Q. Does that indicate to you that it is very probable that H. Z. Ellis, the writer of the letter, known as Exhibit No. 45, was in your employ in October, 1921?

A. It may be so. I do not know that from my own knowledge.

Q. Do you know C. L. Poston?

A. Yes, sir.

Q. Who is he, Mr. Hill?

A. Mr. C. L. Poston is a field sales manager under Mr. S. H. Harris, Inspector No. 3.

Mr. PARKER. Mr. Hill, in answering who this man is, I repeat a suggestion I made yesterday, that you tell what he was in 1921, if there is any difference.

The WITNESS. It is hard for me to recall. I think in 1921 Mr. Poston occupied approximately the same position.

Mr. SMITH. I have here a letter, Mr. Examiner, dated May 20, 1921, from a sales manager who appears to be Mr. S. H. Harris to C. L. Poston. This letter is an American Tobacco Company letter, of course.

830 Mr. PARKER. Are you introducing it?

Mr. SMITH. No.

Q. I read you from this letter as follows, Mr. Hill: "I should like Mr. Winter at the first opportunity to call on these people—that

is Trigg, Dobbs & Co., Chattanooga, Tennessee—and explain that we shall be only too glad to cooperate with them in any way that we can to adjust the price situation in Chattanooga, but he should take advantage of this opportunity to let them know that if they want us to work with them we shall naturally expect them in turn to cooperate and work with us. Of course we cannot refuse to make drop shipments into Chattanooga for the account of Nashville jobbers or any other jobbers outside of the Chattanooga territory, but at the same time we have already made a ruling not to make drop shipments for any jobbers except such drop shipments as comply with the terms of our circular No. 2727.” State whether or not the policy of your company as expressed in this letter as to cooperation with Triggs, Dobbs & Company in every way to adjust the price situation in Chattanooga was similar to the policy of the American Tobacco Company in Philadelphia in 1921?

Mr. CALDWELL. I do not think it has any bearing as to the Lorillard, but I reserve objection.

631 A. May I answer your question in my own words?

Q. Yes; that is what I want you to do, Mr. Hill.

A. The policy of the American Tobacco Company sales department, under my direction, is to extend its brands, of which there are some 448, into as many retail stores, so that the consumers can obtain as many as possible. Our spirit of co-operation with our jobbers is in the furtherance of that policy. Our purpose of limiting all the drop shipments circulars other than circular 2727 is because circular 2727 is designed to secure us additional distribution in the retail stores; and in so far as I have been able to make that clear, our policy was identical in Philadelphia and in this particular case or in any case.

Q. Now, you have not yet, however, answered my question as to the similarity of your policy as it applied to Chattanooga with your policy as it applied to Philadelphia in the respect that in Chattanooga you were only too glad to cooperate with them, Triggs, Dobbs & Co., in every way that you could to adjust the price situation in Chattanooga? Now, what differences, if any, were there in that respect in your policy, with respect to Chattanooga and in your policy with respect to Philadelphia, or was there any difference in your policy?

A. If you will explain to me what the words “co-operation to satisfactorily adjust the price situation” in Mr. Harris’s letter means, then I can state whether our policy was the same in Chattanooga as in Philadelphia.

632 Q. What is your interpretation of what Mr. Harris means in his letter to Mr. Poston as to co-operation on the price situation?

Mr. PARKER. Mr. Smith, do you not think he could explain it better if he read the whole letter?

Mr. SMITH. Yes, he can read this [handing letter to witness].

A. I think I can clearly answer your question after reading the letter. It is evident from the letter that Trigg, Dobbs & Company are not co-operating with the policy of the American Tobacco Company in the proper distribution of its merchandise. They do not place any standing orders, and it is to be presumed that they do not co-operate with our distribution in other respects. Trigg, Dobbs & Company have evidently complained about a price situation. If we are able to be of any assistance to them in a price situation, if there is any particular customer who is disturbing the conditions in that territory, and jeopardizing our business, it is only fair in return that they should co-operate with us in the distribution of our brands, and I understand that that is what the letter says. If that is correct, our policy in Philadelphia would be the same as our policy in Chattanooga.

Q. In other words, if Trigg, Dobbs & Company would co-operate with you towards the proper distribution of your brands you
833 would cooperate with Trigg, Dobbs & Company to adjust the price situation in Chattanooga?

A. No; I did not say that exactly.

Q. Is not that what you might mean?

A. No, sir. I mean that we would not cooperate with them at all until they get busy on our brands.

Q. But that is only another way of saying, is it not, that as soon as they do get busy on your brands you will cooperate with them?

A. No indeed, sir.

Q. Do you have circular No. 2727 with you?

A. I know it. I have not it with me. Perhaps Mr. Beville has one.

Q. You said you could tell us what it was. If the gentlemen on the other side do not object, tell us.

Mr. PARKER. What?

Mr. SMITH. What circular No. 2727 says.

Mr. PARKER. I have no objection if he knows.

Mr. SMITH. He says he knows.

A. I know. Circular No. 2727 is a drop shipment from the American Tobacco Company and offered for the benefit of the retail trade in multiples not to exceed five of twelve cartons, each twelve cartons to contain five different brands of the American Tobacco Company. When that is purchased by a retail dealer, he is given a credit which is shipped at the same time and in the same container
834 with the merchandise of either three packages of Bull Durham or three packages of Lucky Strike cigarettes. The difference between the Bull Durham and the Lucky Strike cigarettes depends upon the desirability of the merchandise in certain territories.

Q. Would you mind getting a copy of that circular for us some time before this case is concluded, so that we can submit it to the Commission?

A. Yes, sir; I will do that.

Q. In this letter which I just showed you, Mr. Harris states: "It looks as if the jobbers in Chattanooga were endeavoring to get together to correct the price situation. Of course, we want to encourage this all we can, but at the same time I think Mr. Winter should take advantage of the opportunity which this letter from Trigg, Dobbs & Company gives him 'to talk a little turkey' to their buyer, whose name at just the present time I do not recall." Now, calling your attention to the following part on this paragraph, "It rather looks as if the jobbers in Chattanooga were endeavoring to get together to correct the price situation. Of course, we want to encourage this all we can," state whether or not the policy of the American Tobacco Company in that respect in Chattanooga in 1921 was any different from its policy in Philadelphia in 1921?

MR. PARKER. I object to that question as put, because that assumes that it was the policy of the American Tobacco Company to encourage getting together in Chattanooga.

635 MR. SMITH. I will correct that, Mr. Examiner.

MR. PARKER. You will correct that, you say?

MR. SMITH. I will correct the question, although I do not agree with the contention that has been made by Mr. Parker. The letter speaks for itself, and says—

MR. PARKER. But it is not from an officer of the American Tobacco Company.

MR. SMITH. It is from the sales manager of the American Tobacco Company.

Q. What difference, if any,—I am asking you this way to meet the suggestion of the objection on the other side—what difference, if any, was there in the policy of the American Tobacco Company between Chattanooga and Philadelphia in respect to that part of this letter which states as follows: "It rather looks as if the jobbers in Chattanooga were endeavoring to get together to correct the price situation. Of course, we want to encourage this all we can."

A. Chattanooga, Tennessee, serves a widely scattered territory. If my recollection serves me at the time you speak of price conditions in Chattanooga were simply horrible. Jobbers had gotten antagonistic one to the other. They were selling with discounts of 10, 20 and 1 off. Our customers, it appeared to us, in Chattanooga, could not exist under the price conditions then prevailing. That was evident to Mr. Harris and it was with some effort to make 636 a profit on merchandise on the part of jobbers in Chattanooga at that time. Naturally we desired our customers to be able to continue in business, and from that point of view were interested in their correcting the situation which was detrimental to the conduct of our business in Chattanooga.

Q. And the same would hold good as to the situation in Philadelphia?

A. I do not know about the situation in Philadelphia.

Q. But assuming that the condition in Philadelphia was the same or similar to the situation as it was in Chattanooga, state whether the policy of your company in respect to Chattanooga would be any different or was any different than it would have been as to Philadelphia.

Mr. PARKER. You ask him to assume all conditions in Philadelphia to be the same as Chattanooga?

Mr. SMITH. The conditions as to which he spoke of in his answer.

Mr. PARKER. You mean, to wit, serving a wide territory, jobbers making nothing; our business being injured?

Mr. SMITH. Yes; he can assume all that.

A. If Philadelphia served a wide territory, if our jobbers were not making a living profit, if our business was being injured in Philadelphia, we would desire to correct the situation.

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By Mr. SMITH:

Q. Mr. Hill, do you remember receiving the wire which was sent by Mr. Beville to you on February 28th, 1921, advising you that on the following day a committee appointed by the Philadelphia jobbers would be at your office to see you?

A. I do.

Q. Did the Philadelphia jobbers come to see you that day?

A. My recollection is that they did.

Q. Do you remember who they were?

A. No, sir.

Q. Do you remember whether one of the jobbers was Mr. Eberbach?

A. I do not, sir.

Q. Do you remember whether one of the jobbers was Mr. Kroll?

A. I do not, sir.

Q. Do you remember what you talked of to those jobbers?

A. Yes, sir.

Q. What was it?

A. It had to do with our making an allowance to those jobbers on certain goods, I think cigarettes, which they had sold to certain sub-jobbers in Philadelphia and which allowance, if my recollection serves me, we refused to make.

Q. As I understand you, it is this: That there was what the jobbers speak of as a deal, a free deal?

A. Yes. You offer the deal in evidence in order to facilitate it.

Q. And the benefit of the deal was to go to the retailer?

A. Yes, sir.

Q. And the difficulty was that the sub-jobbers of Philadelphia wanted the advantage of the deal?

A. Yes.

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Q. And that is what they were talking about?

A. That is what they were talking about.

Q. As an outcome of this talk with you, did you remember whether the sub-jobbers got the benefit of the deal?

A. My recollection is that they did not. Certainly not to the extent that they desired it.

Q. Has Mr. Eberbach called on you during 1921?

A. Probably so.

Q. Did Mr. Kroll call on you in 1921?

A. I do not think so.

Q. Do you know Mr. Kroll?

A. I know Mr. Kroll; yes, sir.

Q. How many times would you say Mr. Eberbach called on you in 1921?

A. A maximum of three times. He was in our office and usually stopped in to my office when he was there.

Q. What did he discuss on these other occasions that you saw him in 1921?

A. I have no recollection. Business in general.

Q. Discussed with you trade conditions in Philadelphia?

A. I presume so.

Q. Tell you how things were over there?

A. Usually told me they were not making any money. That I remember.

Q. Did he tell you why they were not making any money?

A. The reasons differed with everyone that you talked to. I could not recollect.

Q. You could not remember the reasons that Mr. Eberbach gave you?

A. No, sir. Probably because of—I have no recollection. I do not know.

Q. After circular No. 2783, Commission's Exhibit No. 10, was issued by the American Tobacco Company, did you take a trip through the country?

A. Took several trips through the country. Not, however, with that circular in mind.

Q. In any event, after that circular was issued, you did travel through the country pretty extensively?

A. Not more so than before or since.

Q. How extensively did you travel? How extensive was the trip that you took through the country after you issued circular No. 2783?

A. You showed me a letter from Mr. Harvey, addressed to me, one of the American Tobacco Company, Pacific coast. That recalls my recollection that I must have gone from one end of the country to the other.

Q. In that trip, when you went from one end of the country to the other, did you meet jobbers in different places?

A. Yes, sir.

Q. Did you discuss with them the circular which is known as Exhibit No. 10?

A. Yes, sir.

Q. That created quite a stir in the tobacco trade, did it not?

A. Yes, sir.

Q. And jobbers wanted to know all about the meaning of the circular?

A. Yes, sir.

Q. And did you interpret the circular for them?

A. No; other than to say that the circular meant what it said.

Q. Did you interpret the circular to any other extent?

A. Not to my recollection.

840 Q. Were you asked by these jobbers at different places what the circular did mean?

A. Yes, sir; in a great many cases.

Q. What did you tell them?

A. I told them it meant what it said.

Q. Did you tell them anything else?

A. In each case I took the circular before me and read the circular and discussed the circular as it lay before me, and if you desire me to tell you what I said to anybody, I would like to have the circular.

Q. I will give you the circular, Mr. Hill [handing to witness].

A. The reason I asked you for the circular was because I remembered particularly the fourth paragraph in the circular:

"Any jobber who sells our products without profit or with such a small profit that it will not benefit him to continue permanently in the tobacco business on such a margin of profit is not a distributor who can afford us a safe and permanent avenue of distribution, and if by his persistent price cutting he discourages and destroys the interest in our brands with competing jobbers, we may eventually be left without adequate means of thorough distribution in his locality." You asked me if I further discussed the circular. In a general way that outlines my discussion of this circular.

Q. The statement you have just made is merely a reading of the exact language of the circular, is it not?

A. Yes, sir.

Q. You promised that you would tell us what you told to
841 jobbers throughout the country when you discussed the circular. Now, will you tell us what you said in discussing this circular?

A. Well, if I made such promise, I was in error. I certainly cannot recall any more definitely than I have said there, the general gist of the conversation that I may have had with any customer at that time.

Q. Did you speak to more than one jobber or discuss the circular with more than one jobber at the same time at any place?

A. No, sir. It might interest you to know that on that very trip that you speak of, I did not in any one city see in excess of three jobbers, irrespective of how many customers that we had in that particular city. The reason for that was that my trip was a sales trip which had nothing to do with price conditions at all. Furthermore, it is provided for under the principle of sales operation of the American Tobacco Company, in what is known in our "Red, White and Blue," that the number of jobbing calls be limited to the number

of three jobbing calls that can be made in one-half a day, which means that in no case did I call in any one city on more than three jobbers and in no case for the purpose of discussing the circular.

Q. Although you may not have called on any jobbers for the purpose of discussing the circular, discussion always arose?

A. It did.

Q. And I think it is true, is it not, that there were thousands of letters the American Tobacco Company received from its jobber customers after the circular got into the hands of its customers?

A. It did.

ME Q. Do you remember whom you saw in Philadelphia?

A. I have not been in Philadelphia in five years.

Q. You saw nobody there?

A. No.

Q. Mr. Hill, what are the marks, if any, usually appearing on the cartons or containers of tobacco as it is shipped to the jobber?

A. Usually there is a trade mark marked, stating what the contents are such as Bull Durham or Lucky Strike. That is for the purpose of advertising and the purpose of quick identification. Then there is a space left in which is stencilled the name of the jobber and his address. I do not recall whether the point of shipment is necessarily marked too, due to traffic regulations or not, but in our case the most important mark of all is a square that appears on the cartons which gives the date of the manufacture of the goods.

Q. Do you, for the purpose of your own convenience apply numbers to your different jobbers, for your own convenience?

A. I do not know, but I am quite certain we do not. Our jobbers are only known to us by their names.

Q. Do you know whether some of the other tobacco manufacturing companies use a number as applied to the jobbers?

A. I do not know.

Q. But you say that you do not?

A. I say to the best of my knowledge we do not. If it is done, why, we do not know of it in the sales department.

Q. In an answer you have made to one question of mine, you used the expression "Standing orders." Do you remember the use of that expression?

A. Yes, sir.

Q. What is a "standing order"?

A. Well, a standing order is an order which is shipped at regular intervals.

Q. Do you mean that it is an order taken to cover—

A. For a certain quantity to be shipped at certain regular intervals.

Q. For a certain quantity to be shipped at certain intervals, to be shipped at a certain time and certain intervals during that time?

A. Not quite. It is an order for a certain quantity which is to be shipped at regular intervals, but there is no time limit on the

order. I mean you ship one hundred cases of Bull Durham every other Tuesday.

Q. Is it the policy of the American Tobacco Company to endeavor to secure from its customers standing orders?

A. Yes, sir; it is.

Q. How often would you say on the average your customers receive weekly shipments under standing orders?

Mr. PARKER. How often or how many?

By Mr. SMITH:

Q. How many. What percentage of your customers receive weekly shipments on standing orders; that is what I meant to ask you?

A. Well, I can not answer that question in that way. I think this will answer your question, however: At this moment 73
844 per cent of the total output of the American Tobacco Company is on a standing-order basis.

Q. What difference, if any, do you think there is in that percentage, comparing the present time with 1921?

A. 1920, there was not 20 per cent on standing-order basis. Then was not 5 per cent on standing-order basis.

Q. Now, prior to 1921, what was the percentage?

A. Nothing at all. I mean, only an occasional customer.

Q. Now, 1920 and 1921 were abnormal years in the tobacco business, were they not?

A. I do not know. Every year is an abnormal year in the tobacco business.

Q. Well, there was a slump in 1920 which continued through the major part of 1921 in the tobacco business?

A. Not in our business.

Q. Well, was business better in 1920 than it had been in 1919?

A. Yes; it was.

Q. Do you think that business was as good with your company after the war as it was during the war?

A. Yes; better.

Q. Did you have a better percentage of standing orders during the war than you had in 1920 and 1921?

A. No; indeed. If you will tell me what you are trying to get at, I think I can answer you.

Q. I am trying to find out the extent, or the run of your standing orders, say, for three, four, or five years. You say at the present time they constitute 75 per cent of your sales?

A. Yes.

Q. And that in 1921 they constituted only 5 per cent?

A. Yes.

845 Q. Now, I am trying to get you to 1920 and 1919.

A. Well, I bought this package of cigarettes when I came down this morning. The date of the package is October, 1922. Tobacco is a vegetable. Our percentage of standing orders has

increased from nothing at all until it is over 75 per cent of our volume of business, because our business is benefitted by the goods getting to the consumer as quickly and as freshly as possible. Prior to the time you speak of, although we had been in the tobacco business for years, we had not discovered that fact. We sold on deals. Since that time we have cut the deals out, and we have endeavored to get our customers to buy our merchandise in quantities so that we can make regular shipments and thereby get your cigarettes to you within thirty days after they are manufactured, as shown by the package.

Q. Do you know how the other tobacco manufacturing companies do?

A. I do not, sir.

Q. You do not know whether they strive for standing orders before you made a drive in that direction?

A. I do not know whether they are striving for it to-day or not.

Q. When did you start your drive for standing orders?

A. I think it was in 1920-1921. It has only been in full effect for about a year.

Q. Do you not think it was the latter part of 1921 you started that endeavor to get standing orders?

A. If you desire the figure, I can look it up and give it to you definitely, but I do not recall any more closely than I have just said.

846 Q. Well, anyway, from the time you commenced striving for standing orders, you have now reached the point where standing orders constitute 75 per cent of your total sales?

A. Yes, sir.

Q. Can you tell us about the middle of 1921, what percentage of your total sales was represented by standing orders?

A. It was a very difficult thing to get jobbers started on standing orders. I should say the percentage was ridiculously small, but I could not say, unless I looked it up.

Q. You remember my asking you yesterday, Mr. Hill, about those form letters which were gotten up after the issuance of the circular No. 2783?

A. Yes, sir.

Q. Those form letters were known as Commission's Exhibits Nos. 33, 34, 35, 36, 37, 38, and 39. Do you remember whether those forms were actually used?

A. I know they were, sir.

Mr. SMITH. This letter dated September 15th, 1921, Mr. Examiner, from the sales department to Mr. Hill, known as Exhibit No. 40 for identification, I did not offer.

Mr. WALSH. That is the Pacific coast letter?

Mr. SMITH. Yes. I offer that letter and ask that it be marked Commission's Exhibit No. 40.

(The paper was received in evidence and marked Commission's Exhibit No. 40.)

847 Mr. CALDWELL. The Lorillard, of course, objects to it as not binding in any way on it.

Mr. PARKER. It is understood, I think, Mr. Smith, that so far as its being a copy, we waived any objection as to that.

Mr. SMITH. That was my understanding.

Your witness.

Mr. CALDWELL. The direct testimony of this witness having been finished, and no authority or connection between this witness and the Lorillard Company having been shown, I at this time move to strike from the record the testimony of this witness with reference to having written a letter to Mr. Harvey on June 3d, 1921, enclosing what purports to be one of the circulars of the Lorillard Tobacco Company, there being no authority or authorization or representation on the part of this witness in anywise binding upon the Lorillard, and I ask the commission to rule that the testimony as to this circular is not received at this time as against the Lorillard Company.

Examiner McCORKLE. You will note Mr. Caldwell's objection and I will at this time deny your motion.

Mr. CALDWELL. Am I to understand whether under the ruling of the Examiner it is at this time received as evidence against the Lorillard Company?

848 Examiner McCORKLE. I do not interpret it that way. I will let it go in, as to what it may hereafter be determined to be.

Mr. CALDWELL. The examiner has authority to determine as to whether any particular testimony is to be received against any particular respondent, where there are so many respondents combined in one suit, and I will ask you to rule whether this is or is not binding on the Lorillard.

Examiner McCORKLE. I can not pass on that now, Mr. Caldwell. I will have to let it go in and later on, when I come to make my findings, I will do so.

Mr. CALDWELL. May it please your honor, this circular has been admitted in evidence here as the circular of the Lorillard Company, without any proof that it is such a circular. We are being charged with conspiracy in the territory of Philadelphia and that vicinity, and there is no proof that this circular went there by our authority, and it seems to be most evident that it should not be made the basis of a finding of fact against Lorillard Company as a party to any conspiracy, and if anybody can send out any communication and it can be charged to the Lorillard Company, it seems to me that we are going far afield to get information in this upon which a
849 finding will be based, and I regard it as highly prejudicial to my client, and it should be stricken out.

Mr. SMITH. Mr. Examiner, let me answer him, will you please? I did not know whether to answer that objection when it was first made to the admission of that circular. There seems to be an idea in the mind of the gentleman who represents the Lorillard Company that this circular was never issued.

Mr. CALDWELL. No, sir; that is not my idea.

Mr. SMITH. It was issued, and we will call upon the Lorillard Company for the production of this circular and we will call upon the vice president of this company, with whom these interviews about shipping jobbers were held, to testify. Now, there is not any doubt that this circular was issued, and I do not care where it was issued. It established the policy of the Lorillard Company all over the United States, and I will undertake to say now that before this hearing is closed, I will introduce a copy of that circular and show that it was issued by the Lorillard Company, and I hope that will satisfy the gentleman as to the issuance of the circular.

Mr. CALDWELL. He did not get my point at all.

Mr. SMITH. That may be so.

850 Mr. CALDWELL. The situation is this: The subpoena has been served on Mr. D. H. Ball, vice president, served by mail, subpoena duces tecum. I have here a certificate showing his inability to attend on account of illness, and I have here the circulars which were subpoenaed, and those circulars will be turned over to Mr. Smith and he can examine on to his heart's content, but to permit a competitor to send out a circular and say that is binding on the Lorillard Company is going beyond any rules of evidence that I have heard of in any way, shape, or form, and this charges us with conspiracy in Philadelphia, and you certainly cannot convict us of conspiracy in California on a charge in Philadelphia. I insist upon my objection. Mr. Examiner, I ask for a ruling.

Examiner MCCORMICK. I shall not rule the circular out nor shall not say that it is evidence against Lorillard or not at this time.

Mr. CALDWELL. I take an exception.

Cross-examination by Mr. PARKER:

Q. Mr. Hill, when did you become first connected with the American Tobacco Company?

A. I think it was in the fall of 1904.

Q. In the selling department of Pall Mall cigarettes?

A. No, sir. I was first connected with the American Tobacco Company in its leaf department in Wilson, North Carolina.

851 Q. And you went from that situation into the selling department either mediately or immediately?

A. No; about two years.

Q. When did you become vice president of the American Tobacco Company?

A. I think it was stated yesterday, in 1911.

Q. Who was president of the American Tobacco Company when you became first an employee and afterwards vice president?

A. Mr. James B. Duke.

Q. And you have continued your vice presidency under the presidency of Mr. Hill?

A. I have, sir.

Q. Mr. Hill is your father, who was on the stand yesterday?

A. Yes, sir.

Q. Mr. Percival S. Hill?

A. Yes.

Q. And since 1914 you have been vice president in charge of sales?

A. I have.

Q. I failed to ask Mr. Percival S. Hill this question yesterday, but he testified that he was in Philadelphia at least once a year or more. Mr. Percival Hill is a native of Philadelphia, is he not?

A. My father was born and raised there and most of his personal associations are there.

Q. You mean most of his personal associates?

A. Yes.

Q. Mr. Smith in his direct examination of you has referred to your commission's Exhibit No. 41, copy of a letter written by you to Mr. Edward A. Harvey, on June 3rd, 1921, which I show to you. You wrote that letter, so far as you recall, did you not?

A. So far as I recall.

852 Q. And you sent it to Mr. Harvey?

A. I did.

Q. With a note, as I observe, from the notice to the sales managers?

A. I did.

Q. Now, you say these sales managers were six, I believe?

A. There actually were five. The sixth constituted a separate corporation in California.

Q. Were these five gentlemen to whom you sent this letter and Mr. Harvey of the New York office, or were they residents in their respective territories?

A. The answer to both your questions is yes. Some were residents in the New York office, some were residents in their territories. In any event they constantly came to their territory and the New York office.

Q. Was this sent generally, or given general circulation, or was it sent to these gentlemen in order to invite a conference with respect to the policies of the American Tobacco Company?

A. It was sent to these five gentlemen in order that we might have a conference as to how it affected our business.

Q. This letter, commission's Exhibit No. 41, appears to have been accompanied or appears to have enclosed commission's Exhibit No. 42, which purports to be a circular letter issued by the Liggett-Myers Tobacco Company, J. B. Duke and Sons branch, and what purports to be commission's Exhibit No. 43 a circular letter written by P. Lorillard Company to its customers. Did you obtain these copies from either the Liggett-Myers Tobacco Company or the P. Lorillard Company?

A. I did not.

853 Q. Do you know anything whatsoever as to the authenticity of these or whether they were issued by the respective companies or not?

A. I do not. My recollection is that one or both of the circulars or the purported circulars referred to were received by me in the form of a copy and not originals.

Q. You mean, sent in by some selling representative or some such method?

A. I do.

Q. You do not know as a matter of fact in what territory or to what customers, if any, these two so-called circular letters, commission's Exhibits Nos. 42 and 43, were sent at all?

A. I do not know, and I remember I did not at the time.

Q. What relations have been the American Tobacco Company to either of these two concerns, or did you have in 1921?

A. We tried to keep our relationship that of friendly competitors, but other than that I do not know of any.

Q. What do you mean by "friendly competitors"? Is there any other relationship than competitors?

A. In the tobacco business unfortunately there is.

Q. What do you mean by that, Mr. Hill?

A. I mean that the tobacco business is a highly competitive business and whether it applies to jobbing, to retail, or to manufacturing, personalities drift into the business, and if you have a decent respect for your competitor the probabilities are that your business relationship will be more pleasant than if you have not.

854 Q. Did you have any agreements, understandings or any arrangements or cooperation with either of these concerns?

A. I did not.

Q. Did the American Tobacco Company?

A. They did not.

Q. Upon any subject whatsoever?

A. On no subject whatsoever.

Q. What was the reason for your calling to the attention of your sales managers these purported circulars issued by these two competitors, Liggett & Myers Tobacco Company and P. Lorillard Company, commission's Exhibits Nos. 42 and 43?

A. I would not have been on my job if I had not. Things come up in business. Those things must be discussed by those responsible for the sales policy of an organization. The letters referred to were discussed in that way.

Q. You mean to say that you desired to discuss with your associates the policies that the competitors were taking with respect to their customers?

A. I must be familiar with policies as quickly as I can that competitors are taking with respect to their customers, the same as I must be familiar with all deals, all deals and prices that competitors make.

Q. Did you have any information directly or indirectly from the Liggett Myers Tobacco Company or the Lorillard Company, that they contemplated issuance of circulars, Exhibits Nos. 42 and 43, before the issuance, or thereafter?

A. I did not.

Q. In the spring of 1921, so far as you observed the trade, 855 what was the condition among jobbers as to profitable conduct of their business in the distribution of popular brands of tobaccos and cigarettes.

A. I had been connected with the American Tobacco Company in a selling capacity since 1907. Never in my experience were there so many complaints about the demoralization of prices and the lack of profit in the business. The dissatisfaction with the business and threats on the part of many of our customers and acts on the part of others, that they would discontinue the handling and selling of tobacco products by reason of lack of profit in the business.

Q. Did that condition differ in intensity in different sections of the country?

A. Yes, sir.

Q. Following June 3rd, 1921, when you wrote this note to Mr. Harvey, commission's Exhibit No. 41, were there conferences between yourself and your associations with reference to this situation?

A. I presume so.

Q. Were there conferences between yourself and the president of the company?

A. I presume so.

Q. Well, do you not remember that there were, Mr. Hill, about this situation? I am not asking for a particular conference.

A. No; I do not.

Q. Were there conferences between yourself and counsel of the company?

A. That I remember; there were. Is your question, were there conferences after the receipt of those two circulars?

Q. After June 3rd, when you sent those circulars to Mr. 856 Harvey, without reference to when you got a copy of them.

A. As applied to the counsel of the company in that respect I do not remember. I was thinking of the circular in your hand at the present time when I spoke.

Q. The circular in my hand at the present time, to wit, circular No. 2783, commission's Exhibit No. 10, is dated June 29th, 1921. Your notice to Mr. Harvey, commission's Exhibit No. 41, is dated June 3rd, 1921. Now, I ask you if between those two dates, June 3rd and June 29th, you participated in conferences with the president, the law department or counsel of the company, sales managers, with respect to this prevalent and extreme price-cutting situation?

A. I did.

Q. And the result of those conferences was the issuance of your circular No. 2783?

A. It was.

Q. Was that circular in substance and range approved by your counsel?

A. It was. My recollection is that I personally wrote the original circular. It was afterwards approved by our counsel.

Q. I believe you stated in answer to questions on direct examination that there were a great number of responses by jobbers to this circular of June 29th, 1921?

A. There were. More than any circular I have ever seen issued.

Q. Did the circular itself call for a reply?

A. No, sir.

857 Q. Were these letters that you had from jobbers that you state to be responsive to the circulars, all of the same kind?

A. No, sir.

Q. The counsel for the commission has introduced and called to your attention papers called form letters, Exhibits Nos. 33 to 39, inclusive; and in the form in which they are introduced they seem to bear a date, November 5th, 1921, whereas circular No. 2783 bears a date June 29th, 1921. Does that date, November 5th, 1921, represent the time when those were prepared?

A. I believe not so, sir. My recollection is that there was a period between—let me say that we did not expect or desire an answer to circular No. 2783. Upon receipt of numerous answers to No. 2783 it became impracticable to handle the answers because they were so voluminous. Thereupon we arranged the form letter, which was just sent out generally and automatically forwarded out.

Q. But you think that the preparation—

A. Was prior to November.

Q. Was prior to November?

A. But after the answers to the circulars No. 2783 began to come in in such quantity, which was perhaps thirty days.

Q. After those letters from jobbers, which merely commended, or if any of them did, condemned the policy outlined in No. 2783, was any letter at all sent?

A. I believe not, sir.

Q. Form letter, the commission's Exhibit No. 33, was to be sent to the jobbers who made inquiry as to the purpose of the com-
858 pany, was it not?

A. Yes, sir. To those who thought the millenium would come.

Q. And to them this letter was prepared so that clerks might attach your signature thereto and forward it to the jobber?

A. Yes, sir.

Q. And to them you stated, did you not, "It is not our purpose to attempt to establish the price at which our merchandise is sold. That is a matter which rests entirely in the hands of our customers in any given community"?

A. I did.

Q. Why did you not prescribe a price at which you desired your merchandise to be sold prevalent throughout the country?

A. It is not any of our business.

Q. Are the conditions identical throughout the country with respect to the expense of doing business and other such conditions?

A. That is what I meant to imply by my answer. I do not know what a good legitimate profit for a jobber may be in any given community. It varies so. He is the best judge.

Q. Now, form letter, commission's Exhibit No. 34, was prepared in order to be sent by an intelligent clerk or secretary, under your signature, to what classes of inquirers?

A. To those class of inquirers who requested us to be interested in an association of jobbers or wholesalers of any sort.

Q. Were there before 1921, within your knowledge, gotten from trade gossip and otherwise, already existent associations of grocers and tobacco jobbers in various parts of the country?

A. Very many.

839 Q. And some of them were large and some of them were small, were they not?

A. Correct.

Q. Were you familiar with the Southern Wholesale Grocers Association?

A. Only by reputation.

Q. Trade gossip?

A. I really do not know whether it is reputation—whether its reputation was good or bad. I only mean by trade gossip.

Q. Was not there the Western Grocers Association?

A. Yes, sir.

Q. And I understand that your answer to my question with reference to commission's Exhibit No. 34 is that there did come in letters from offices of already existing associations or with respect to associations in the forming?

A. Correct.

Q. And you prepared or there was prepared under your direction form letters in order that they might be answered, and did you state there, "We beg to state that we here are not interested nor do we cooperate with any association of jobbers or wholesale grocers whatsoever. We are simply interested in the proper distribution of our brands by the legitimate distributor, and at this end we state that it is not our purpose to establish a price at which our merchandise is sold"? Did that truthfully represent the policy of the company?

A. It did, and I so answered such letters.

Q. Referring to commission's Exhibit No. 35 did your circular No. 2783 apparently call forth letters from jobbing customers
860 who spoke to you of your selling direct to retailers, mail order houses, or some other such customers?

A. It did.

Q. And those letters were so frequent that there was prepared under your direction a form letter which might be signed by an intelligent clerk in your name, in which this statement is made

(commission's Exhibit No. 35): "In response to your inquiry we would state that we believe the list of direct accounts of this company is today 'cleaner' than it has ever been in the history of the tobacco business. It is a policy here to only sell such legitimate jobbers who serve as distributors of our products in a given community and we are becoming more and more of the opinion that the distributor who does not carry in stock a representative line of merchandise manufactured by this company, so that he may serve well the local retail trade is not a distributor that is of value to this company." Did that truthfully represent your opinion at the time?

A. It did.

Q. Does it truthfully represent your opinion of the proper policy of the American Company at this time?

A. It does.

Q. What did you mean by the word "cleaner" in quotations in that form letter?

A. Surprising as the statement may be, it can be clearly shown that there are clothing establishments which go so far as to cut our retail price of cigarettes to one-half of the jobbers' cost. That is, to induce men to come in and purchase suits of clothes. As an extreme illustration of what I meant "cleaner," those people
861 can be of no benefit to the American Tobacco Company in the distribution of its products, and can only be looked upon as a menace to our business and to our ability to serve the great mass of tobacco distributors and retailers and consumers ultimately. Those are the class of people we do not sell.

Q. And you meant that you had eliminated to a greater extent than ever in your knowledge of the tobacco business that class of demoralizing parodical customers?

A. Correct. Then there is another class. As I described a few minutes ago, it is always our endeavor to get our merchandise to the consumer as freshly as possible. Inspection of our accounts show us that some of our customers who have gotten on for I do not know what reason—their business was so small that they actually bought our merchandise in shipping quantities, case lots, and carried them in stock so long as to be a detriment to the merchandise itself, and those people we have eliminated from our list. In other words, people who can turn this merchandise over rapidly enough, so that it reaches the consumer in a fresh condition that we require in our business.

Q. Mr. Hill, commission's Exhibit No. 35 and commission's Exhibit No. 36 are identical, are they not?

A. I thought they were yesterday. That is what I mentioned to you. I did not read them in detail, but I think I mentioned it to you. May I read the one while you listen to the other?

[Reads.]

862 Q. Commission's Exhibit No. 35 and commission's Exhibit No. 36 are identical, are they not?

A. Yes.

Q. Now, Mr. Hill, commission's Exhibit No. 38 is not dated, is it?

A. No, sir.

Q. But it is referred to in a letter written to by Mr. Harvey on September 15th, 1921, and it was therefore prepared before that day?

A. It was.

Q. You received sometimes, did you not, complaints or statements by letters from customers to the effect that some competing jobber of some writing customer was doing an injury to the business and demoralizing the prices to such an extent as to kill the interest of jobbers in that community in distributing the products of your company? Was this form, commission's Exhibit No. 38, gotten up in order that an intelligent clerk might properly answer such letter?

A. Not exactly, sir.

Q. Did I understand you to say that there were general complaints sent in?

A. I said not general complaints, but I mean complaints of a particular customer; yes, sir.

Q. Or generally any other kind?

A. It was.

Q. Did you or did the American Tobacco Company, by circular No. 2783, or otherwise, at any time invite or encourage such complaints?

A. No, sir; we regretted to receive them.

Q. Why did you regret them coming in?

A. All that we were interested in in this matter was the preservation of our own business. Many times these letters would be
863 received from customers who thought that they would be glad to make more profit than they were making at the present time and who interpreted our circular as being an aid to them to increase their present profits. We did not want to offend our customers, but that was not the effect of the circular at all, and therefore we regretted to receive such letters because this made it a little difficult to answer them and still keep them happy.

Q. If the letter from the jobber was of a particular customer but general in its statements, you had the clerks to write this letter, "If you furnish us with definite or specific information the matter will be carefully investigated by our representative"?

A. I did.

Q. Now, sometimes did you not, without invitation and contrary to your desire, get letters from customers complaining of unprofitable prices being made by some competing jobber to the injury of your business, giving details?

A. We did.

Q. And to such was the reply made on form, commission's Exhibit No. 37?

A. It was.

Q. If the complaining customer made the statement definite with respect to a competitor and indicated a price being made by that customer complained of, which, in your judgment, might do injury

to the business, you wrote to the salesman on form, commission's Exhibit No. 39?

A. I did, or the sales manager did.

Q. This letter, commission's Exhibit No. 39, addressed by the sales manager to the field representatives said, "Will you kindly
864 advise us as to whether in your opinion (jobber) activities are interfering with and endangering the distribution of our brands and, if so, would you advise so we can discontinue blank (jobber) from the direct list of the American Tobacco Company?" The quotation is correct, is it not?

A. It is.

Q. Was it the habit of the field representatives in response to a letter like unto commission's Exhibit No. 39 to simply write his opinion and his advice, or his reasons therefor?

A. I do not know of any case where his opinion and advice without complete information being received was accepted by the office without writing to that representative again as to the detailed conditions connected therewith.

Q. As a matter of fact, Mr. Hill, field representatives generally went into details in their first letter, did they not?

A. They did.

Q. Now, as to whether if he advised the cutting off of the customer, and that his activities were interfering and endangering the distribution of your brands, then I understand the matter was taken up by you and your associates in the New York office, including the president of the company, and a decision was reached?

A. A decision was reached there, in the New York office.

Q. What determined the decision of you and your associates, including the president of the company, on the question of retaining or ceasing to retaining a given direct customer?

A. Solely the interest of the American Tobacco Company
865 and the danger to the proper distribution of its brands and by a continuation of that condition.

Q. Was there any other factor whatsoever considered in reaching that determination?

A. None whatsoever.

Q. During the years 1920-1921, or at any other time, did you decline to sell any of your theretofore existing customers or decline to put on any applying new customers in and around Philadelphia or elsewhere, because of the request of any jobber or group of jobbers?

A. We did not.

Q. Meaning the American Tobacco Company?

A. Meaning the American Tobacco Company did not.

Q. Did the American Tobacco Company, so far as you know or believe or ever heard, during the year 1920 or 1921, or since, mark its cartons in any way in order to ascertain who price cutters were?

A. No, sir.

Q. Or to follow up where the goods went?

A. No, sir. My recollection is, we had a controversy with one of our customers in central Pennsylvania, not on the question of price cutting at all. It was on the question of substitution of an inferior brand for the brand of Bull Durham in the cartons. We cut that customer off, and we did trace certain shipments of our goods to that particular customer in order to confront him with the proof that he actually made the substitution in the cartons.

Q. Did you ever adopt any system of carton marking, reports from jobbers, systematized reports from salesmen or otherwise, 866 to detect price cutters?

A. No, sir. We had another case in Atlantic City with the Pennsylvania Railroad. We had a factory in Atlantic City and for a period of six months regularly these shipments of our merchandize from Atlantic City to Philadelphia or to New York and Philadelphia were robbed out of the freight cars of the Pennsylvania Railroad Company, and there was something that they did to detect that robbery; but we never had such a system for any price cutting situation.

Q. Nor did you ever have a system of reports from jobbers or jobbers' associations or systematized reports from salesmen with respect to it?

MR. SMITH. I object to that. That is an attempt to contradict by parole the written proof.

MR. PARKER. I should think that objection is hardly a valid one.

EXAMINER MCCORKLE. Overruled.

A. Not to my knowledge.

By MR. PARKER:

Q. Did Mr. Faulk, in 1921, so far as your recollection goes, have anything to do with the distribution of the goods of the American Tobacco Company in and around Philadelphia?

A. I know that he did not.

Q. What part of New Jersey did he travel in?

867 A. My recollection is Mr. Faulk was the division manager at that time in northern New Jersey.

Q. That is the part of New Jersey contiguous to New York?

A. Contiguous to New York.

Q. Mr. Riggio's activities did not include Camden or that part of New Jersey that is contiguous to Philadelphia, did it?

A. My recollection is that it did not at that time. At that time my recollection is that Mr. Beville had charge of that territory south to Atlantic City. At some time subsequent to that we rearranged our sales line, and Mr. Riggio took southern New Jersey and Mr. Faulk became sales manager over New Jersey, but at the time spoken of I think Mr. Faulk was solely confined to what we term our northern New Jersey territory.

Q. Did you know of correspondence between Mr. Faulk and Mr. Riggio of July, 1921, until it was called to your attention yesterday by Mr. Smith?

A. I did not, sir.

Q. Did you know of the correspondence between Mr. Harris and Mr. Poston affecting conditions in Chattanooga, until it was called to your attention by Mr. Smith to-day?

A. I did not, sir. I knew, as I stated, from Mr. Harris that conditions on prices were bad down there. That is all.

Q. But you did not know of the letters, never having read them?

A. No, sir; I knew nothing of that.

Q. The policy of the American Tobacco Company with respect to cutting off distributors as outlined in your circular No. 2783, commission's Exhibit No. 10, was to cease selling any customer 568 when you thought he was injuring your business?

A. Yes, sir.

Q. And how is that done, by a letter to said customer?

A. My recollection is that the form it took was, the matter was discussed, and the individual case was gone into thoroughly, and it was decided that our business was being injured, and the credit department thereupon wrote by letter to the customer, advising him of the discontinuance of his account.

Q. Was that action that you spoke of the only method adopted by the American Tobacco Company to cooperate with Trigg & Dobbs & Company or other jobbers?

A. As far as I know.

Q. Did anybody representing the American Tobacco Company with the authority of any officer of the American Tobacco Company ever promise Trigg, Dobbs & Company or any other jobber, that it would cut off and refuse to sell any particular jobber?

A. It did not.

Mr. SMITH. Just a minute. The answer is in, Mr. Examiner, but I wanted to object to the question. I think I will state by objection here, although the answer is in. I object to this question because it is an attempt to contradict by parole the written evidence of the intention of the American Tobacco Company. It is also an attempt to contradict by parole the written proof that the American Tobacco Company did offer to jobbers throughout the country 569 cooperation on the maintenance of prices prevailing of given territories.

Mr. PARKER. I submit that the answer should stand, if that is intended as a motion to strike out.

Examiner MCCORMIE. Mr. Smith has his objection noted. I will let the answer stand.

By Mr. PARKER:

Q. Mr. Hill, the American Tobacco Company introduced yesterday as its Exhibit No. 5 a certain circular dated January 27th, 1921. You have stated that as you recall you had an interview with certain

Philadelphia jobbers whose names you do not recall, and that that interview had to do with their securing reimbursement for Sweet Caporal cigarettes delivered by them under the terms of that circular to sub-jobbers in Philadelphia. That is correct, is it not?

A. It is.

Q. Did you comply with their suggestion that there be such reimbursement, so far as you recall?

A. To my knowledge, I did not.

Q. Why?

A. The purpose of the sales department is to distribute our many retail brands in as many of these tobacco shops as we possibly can. We advertise our brands to the consuming public, who in turn buy these brands in these shops as described. The purpose of this deal was to place the brand of "111" cigarettes in as many stores in the territory that the deal covered as possible. We figured the ex-

870 pense that that deal would be to us, putting on the deal; and we figured that expense as against accomplishing that object. If a sub-jobber purchased merchandise under this deal, and did, as is the habit of sub-jobbers, take the gratis off and keep the profit for himself, the money that we paid to distribute the deal would have been wasted. The deal would not have gone to the retail merchant for whom it was designed. And it was for that reason and for that reason only that I personally refused to allow the sub-jobbers to participate in these deals. It had nothing to do with the jobbers who came over from Philadelphia. It had nothing to do with the organization. This particular deal had nothing to do in that case with price. We paid our money to get a result. If we did not get our result, we lost our money.

Q. This method of getting goods into the hands of retailers, gratis is generally accomplished by the drop shipments, is it not?

A. Generally so; yes, sir.

Q. Now, the drop shipment involves the retailer placing an order for some specified quantities?

A. It does.

Q. Which order is by the retailer given to a particular jobber, and if the jobber approves the order goods are shipped by the American Tobacco Company factory or warehouse to the retailer, and there is charged to the jobber the amount of said shipment?

A. As per our list price, or at present net price.

871 Q. Now, the gratis that is in the drop shipment is not billed to the jobber at all, is it?

A. Not at all.

Q. And the drop shipment in that case insures the retailer securing for himself that gratis?

A. It does.

Q. Now, the charge that has been made to the jobber is at the prevailing prices in 1921, there being a discount, just as if it were shipped to his stock?

A. Exactly.

Q. And the jobber pays you for those goods whether or not he collects from the retailer or not?

A. He does.

Q. And it becomes a part of the current account against that jobber?

A. It does.

Q. So it is a mistake to assume, as might be assumed from your direct examination, that the jobber collects for the American Tobacco Company from the retailer, if by that is meant a specific collection?

A. I tried to make that clear. It is a mistake to assume that. It goes into the jobber's general account with us and we never know whether the retailer pays the bill or not.

Q. And in the majority of instances, if the retailer does pay, you do not know how much he pays?

A. We have no idea, because the order has been solicited without a price on the order. That is a fact in all cases, because we will not accept a drop shipment order with the price stated thereon.

Q. Perhaps the examiner does not understand that many
872 drop shipments are taken by retail salesmen of the American Tobacco Company?

A. Correct.

Q. In order to get the goods out, although these orders are turned into the particular jobber?

A. And of course those are orders we will not accept a price on. We have nothing to do with what the jobber charges to his own salesmen should he take the drop shipment. That is his business. But as far as our men are concerned, we will not allow our men to make a price on a drop shipment.

Q. Who selects the jobber?

A. The retail dealer. In our solicitation of a retail merchant, which our men use, we have a phrase which they use; that phrase is "What jobber do you buy through?"

Q. And there is no inquiry as to "What prices do you pay that jobber?"

A. No, sir; the answer to that question determines through whom the goods are sent.

Q. You spoke of a drive of the American Tobacco Company to secure standing orders?

A. Yes, sir.

Q. And you said that 75 per cent of the sales you thought now, of the American Tobacco Company, were on standing orders?

A. I so believe.

Q. Do you include in that comparison drop shipment sales?

A. My figures may be slightly incorrect. They are not far from being right. I was not so including drop shipments.

Q. You meant of all the shipments to jobbers, stocks?

A. Excuse me. Yes; I meant the total sales of the American
873 Tobacco Company; 75 per cent of them are on standing order, including drop shipments.

Q. And you include in that drop shipments?

A. Yes, sir.

Q. Although drop shipments are never on standing order?

A. It is the greatest exception when they are. Never a drop shipment is on a standing order when taken by our men, but occasionally a jobber will take a drop shipment on the basis of a standing order for a particular customer, and that is a great exception and something we do not encourage.

Q. Now, Mr. Hill, is the drive primarily for standing orders or is the drive primarily for small orders?

A. The drive is primarily for small orders. When we speak of the standing order the instructions are to the men, "Undersell; do not oversell."

Q. You mean by "undersell" not with reference to price but to quantity, do you not?

A. Yes. I mean if a man deals in a 100,000 Lucky Strikes a week our division manager calling on that jobber will probably solicit two shipments of Lucky Strikes during that week, one shipment to consist of perhaps 40,000 on Tuesday, another shipment to consist of 40,000, perhaps 50,000, on Thursday of the same week. That means that we sell that jobber, if his requirements are 100,000 a week, 90,000 on standing order, because the jobber handles his business very carelessly in most instances, and if you do not undersell him, as I have expressed it, the first thing you know that standing order will pile up on the jobber's shelves and then the
874 object of the standing order will be defeated, because your goods will become old. The whole theory of the standing order, as worked by the American Tobacco Company, is fresh merchandise to the consumer.

Mr. PARKER. Mr. Examiner, it is 12.30, and I think I am through, but Mr. Walsh wants to talk to me about a matter or two.

Examiner MCCORMICK. We will adjourn until two o'clock.

(Whereupon an adjournment was taken at 12.30 o'clock p. m. to 2.00 o'clock p. m.)

AFTER RECESS

GEORGE W. HILL resumed the stand.

Cross-examination (continued) by Mr. PARKER:

Q. Mr. Hill, in your cross-examination you referred to the efforts made by the American Tobacco Company to induce jobbers to give standing orders for frequent delivery. What was the main purpose of the American Tobacco Company in adopting that policy?

A. I think I stated the main purpose.

Q. Would you please restate it?

A. The purpose was definitely to get our merchandise,
875 tobacco, which is a vegetable, as quickly into the hands of the ultimate consumer as possible.

Q. Thinking that in that way it would be more acceptable to the consumer?

A. The consumer gets a better product.

Q. And a better smoke?

A. Or chew.

Q. Or a chew?

A. Yes, this, of course, being after it is manufacturing, the aging of tobacco is done prior to its manufacture—the better it gets to the consumer after manufacture.

Q. From your knowledge of the tobacco business, in your judgment, is the frequent receipt of small quantities better for the jobber as well as for the manufacturer?

A. It is.

Q. Is the jobber also interested in the goods going to the consumer in the best possible condition?

A. He should be.

Q. What about the economy of the conduct of business in the frequent turnovers of capital involved in giving small standing orders, as compared with occasional long orders?

A. I stated, I think, previously that it was difficult for us to induce our jobbers to give us standing orders. The reason for that is that there is little or no economy, and perhaps an expense to the jobber, in placing standing orders with the frequency that we desired. When you talk of the turnover of a business on standing order, only affects that portion of a turnover of a business which is actually in a jobber's stock. The merchandise in his stock. The best thing that a jobber must consider in a turnover on his business is the extent of his credit in the trade; if he has \$40,000 out in

876 credit and he does not get his bills collected but once every six months, regardless of how frequently he gets standing orders, he only turns his \$40,000 twice a year, so that the standing order only helps him as a turnover, a quick turnover on the actual proportion of his business which is lying in his warehouse. Then the difficulty that we have in selling standing orders is caused by the fact that a considerable proportion of the jobber's expense lies in the handling of the merchandise from the depot at which it is delivered and the drayage up to his place of business. If a man places an order for 500,000 Lucky Strike cigarettes in a single shipment, he sends his dray down, or makes one deal with his drayman, if he don't operate his dray at the station himself, and hauls that 500,000 up on one truckload, which costs him one price. If that is the quantity that he wishes, for instance, in five weeks, and he has 100,000 instead of the 500,000 at one time delivered to him each week, it means that the arrangement has to be made with his drayman to call five times for the 500,000, and the jobbers object to that, they always put their objection up to us about the difficulty and the expense and the trouble and difficulty of the drayage. Now, the advantage, we think, is very strong, because we think a jobber that gets the reputation of handing to his retail dealer fresh merchandise has a distinct ad-

vantage as contrasted with the jobber that ships out any sort of merchandise which the ultimate dealer or consumer might complain about later.

877 Q. The real——

A. But there is no saving, as far as money is concerned, that I know of.

Q. The real——

By Mr. WALSH:

Q. No saving to the jobber, you mean, so far as the jobber is concerned?

A. Yes, sir.

By Mr. PARKER:

Q. There are, so far as economy is concerned, counter-balanced economies and expenses in the one method of small shipments, as compared with the other method of large?

A. Yes; I would say so.

Q. It is by no means true, is it, that regardless of credit conditions in the conduct of his business, the jobber who gets weekly shipments of goods, even if all his goods come in weekly shipments, thereby turns over his money—thereby turns over his money fifty-two times a year?

A. No, sir; he has to get it in to turn it over.

Mr. PARKER. That is all, Mr. Hill.

By Mr. CALDWELL:

Q. Mr. Hill, I understood you to state that on or about June 3rd, 1921, you wrote a letter to a Mr. Harvey, in which you enclosed what purported to be a copy——

A. Pardon?

Q. In which you enclosed what purported to be a copy——

A. Yes, sir.

878 Q. Of a circular dated May 25th, 1921, of the Lorillard Company. Did you so testify?

A. I did.

Q. Were you ever an officer or employee or agent of the Lorillard Company?

A. No, sir.

Q. Were you authorized or requested by anyone connected with the Lorillard Company to send out that circular?

A. No, sir.

Q. Was that circular sent out with the knowledge or consent of the Lorillard Company?

Mr. SMITH. Just a minute. Sent out by whom—by this witness to Mr. Harvey?

Mr. CALDWELL. Yes; was sent out by you in this letter referred to with the knowledge or consent of the Lorillard Company or any of its officers or agents?

A. No, sir; they had nothing to do with it.

By Mr. CALDWELL:

Q. In other words, no officer or representative of the Lorillard Company had anything whatsoever to do with your sending out of that circular?

A. They had nothing to do with it; it was my business.

Q. Was it, in fact, a printed circular or was it what purported to be a copy of a printed circular, that you sent out in that letter?

A. I can not say; I think I stated on my previous testimony—in my previous testimony—that my recollection was that one of the two circulars, certainly one, perhaps both, were typewritten copies—oh, excuse me, purported to be typewritten copies—that were sent to me from the field. As to whether this was a typewritten copy or a circular I have no recollection. I don't know; I don't know.

Q. But you stated you sent six of these copies out to six of your salesmen?

A. Oh, undoubtedly the copies that I sent out were retyped in my office, but I was speaking of the original circular, or of the original paper, original to me, from which these copies were drawn.

Q. Will you give us the date that the circular bears date that you sent out, together with the number of the Lorillard circular, please?

Mr. SMITH. Mr. Examiner, that appears in the record itself.

Mr. CALDWELL. That is what I want to get on the record.

Mr. SMITH. It is 1350.

Mr. CALDWELL. Well, I don't want to get it confused with any other one.

Mr. SMITH. Exhibit No. 43.

The WITNESS. The copy before me reads "Circular No. 1350" and is dated May 25th, 1921.

Q. Are you referring now to commission's Exhibit No. 43?

A. I am.

Q. That circular was not the subject of any conference between you and any officer or representative of the Lorillard Company, in any way, was it?

A. Neither that nor any other circular.

Mr. CALDWELL. Now, Mr. Examiner, I renew my motion to strike out this circular, so far as it is received in evidence against the Lorillard Company, on the ground that it now affirmatively appears that in sending out this circular, this witness was not in anywise acting in behalf of the Lorillard Company, and his act in so doing should not in anywise be binding upon the Lorillard Company.

Mr. PARKER. Mr. Examiner, in order that there may not be any misunderstanding, I think that counsel for the Lorillard Company ought not to refer to this circular as sent out. There is no evidence that the American Tobacco Company ever sent out this circular. The evidence simply is that it was called to the attention, by a letter of Mr. Hill, to five or six of the sales representatives of the American Tobacco Company.

Mr. CALDWELL. That is what I have had along in mind when I used the words "sent out"; the only evidence of it being sent out at all was that of this witness, in which he said that he had sent a letter, which as I understood, enclosed a copy of this circular, and was addressed to six of the salesmen or representatives of the American

Tobacco Company and I am using the words "sent out" in
881 the sense of communicating it to these six people only. Now

I ask for a ruling on my motion. There is certainly no authority on the part of this gentleman to bind the Lorillard Company.

Examiner McCORKLE. You have already let it in, haven't you?

Mr. CALDWELL. Yes. Now I am asking to strike it out as against the Lorillard Company.

Examiner McCORKLE. I do not think I will rule it out. I do not know just the effect of it; I have not had time to consider it in the way of how much weight it is entitled to, or whether it is real evidence or not, but at this time I will not strike it out.

Mr. CALDWELL. The motion, then, is denied?

Examiner McCORKLE. Yes; the motion is denied.

By Mr. CALDWELL:

Q. In reply to a question asked you by counsel for the American Tobacco Company you used the term "friendly competition" in reference to competition between the American Tobacco Company and other manufacturers of tobacco. Will you please state what you meant by "friendly competition"?

A. May I have the question and my reply read?

882 Mr. CALDWELL. I would reply to that that the same stenographer who took that is not present, so therefore it would be impossible to read you the question and answer.

A. (Continued.) There is no business that I know of where the competition is so keen as it is in the tobacco business. That does not apply solely to the manufacturer, but applies to the jobber and the retailer, and even to the retail salesmen of competing manufacturers. Now, all of these retail salesmen, in the case of the American Tobacco Company under my direction, in the case of Lorillard under somebody else's direction cover similar routes. Our salesmen call on the same retail stores that Lorillard salesmen call upon, the same stores that Liggett & Myers salesmen call upon. Now we have found that competition can be clean competition and can be dirty competition, and in both cases still be really keen competition. To illustrate, take the case of these two salesmen, for example, one of Lorillard's men and one of our men working the same territory. Lorillard's man goes down the street, calls on the retail dealer, and puts up, for instance, window posters. Our salesman comes along the next day, calls on the same dealers, goes on the same street, there is the space that Lorillard's man has put the window posters up on. It has been unfortunate in the tobacco business that many times the
883 competition was so keen between those two retail salesmen that the man following the first salesman would destroy the

first salesman's work deliberately. Instead of putting his poster in another location on the window, he would tear it down and put his poster on the location that had been previously selected by the previous salesman. Now that illustration applies all the way through the business. I have the good fortune to know personally your Mr. Ball, of the Lorillard Company. If Mr. Ball, I hope, were told that I were to do a disreputable act, I do not think Mr. Ball would believe it. I certainly would not believe it of Mr. Ball; if I used the word "friendly competition" I used it in that sense, the sense of decent competition; nothing but decent competition leads to useless effort and destructive ways in all branches of the business.

Q. You do not mean to include in that, then, that there was any cooperation or understanding or agreements of working together as to prices or of policies?

A. I don't mean to include it, because there is none.

MR. CALDWELL. That is all.

Redirect examination by Mr. SMITH:

Q. Mr. Hill, you speak of the comparison or the keenness of competition in the tobacco industry with other industries, have you ever been connected with any other industry?

A. Only in a general way.

Q. Well, you had never been directly connected with any
884 other industry other than the tobacco industry?

A. I don't think that is—I don't think I could answer that question; no; because I am a director in the Seaboard National Bank and one's friends discuss business matters with one, and in that way I have known of other industries and been in touch with them.

Q. You spoke of the demoralized condition in the wholesale tobacco business in 1920 and 1921. Isn't it true that all wholesale businesses and all jobbing businesses in the United States were affected as the tobacco business was affected in 1920 and 1921?

A. No.

Q. Don't you know that wholesale grocers had hard years in 1920 and 1921?

A. Yes; I know they sold sugar below cost.

Q. You know there were many bankruptcies in the wholesale grocery business?

A. Yes, sir.

Q. You mentioned in one of your answers, or you used in one of your answers to a question by Mr. Parker the expression "legitimate distributor," referring to a distributor of the American Tobacco Company. Whom do you put in the category of a "legitimate distributor" of the American Tobacco Company?

A. Our purpose in the selection of our distributors is to have on our direct list of customers those jobbers who serve best the retail trade. I would have to have a specific case to answer your question definitely, excepting that I might say that in our opinion a distributor should have wagons, he should have salesmen on the road

and he should have those means, physical means, required for the distribution of our products, in addition to being properly rated as to credits.

885 Q. Now, are there any other things which enter into his being classified by you as a legitimate distributor?

A. Yes, sir.

Q. What are they?

A. I would not do business with a man that I knew was a crook.

Q. What do you mean by the expression "crook"?

A. I mean a man that would deliberately do a dishonest act.

Q. What would you call a dishonest act which would change your estimate of the distributor from his being a legitimate distributor to an illegitimate distributor?

A. Well, sir, we have had cases where, for example, a customer of ours, in making out his bill to the retail trade would add in the date as a part of the charge on the bill. I would not consider that man a legitimate distributor of the American Tobacco Company.

Q. Now, are there any other features or disabilities by means of which you would remove from the description of a legitimate jobber to a jobber whom you call—whom you might call an illegitimate jobber?

A. I mentioned this morning the case of a customer of ours in central Pennsylvania who cut open the bottom of Bull Durham cartons of two dozen and substituted for Bull Durham another brand or brands; in this case there happened to be three different kinds that he wanted to get rid of, and sold those as Bull Durhams; we do not consider him a legitimate distributor.

Q. Do you remember in answering a question of mine this morning you stated that some of your distributors were cut off while
886 perhaps not for the sole reason that they did not abide by the price prevailing in the territory, that may have been one of the reasons? Do you remember stating that?

A. I think I did, sir.

Q. Now, do you consider—

A. Excuse me; I do not think I said not adhering to the price in the territory; I think I said them selling at a price which we considered injured our business in that territory.

Q. Selling at a price which you considered injured your business in the territory, or a price cheaper than the prevailing price, wasn't it?

A. I suppose it must have been.

Q. Now, did you consider the jobber that sold in a given territory at a price to the retailer less than the prevailing price, or, as you termed it, one at which it did not give him a profit, did you classify and call, or do you classify and call, that distributor not a legitimate distributor?

A. No, sir; we did not.

Q. So that the term did not apply to a cut-price distributor or jobber?

A. Not necessarily.

Q. Well, why do you say not necessarily?

A. Why, because I can consider that if we had a jobber who sold at such a low price as to make our business—as to endanger the distribution of our brands in the territory that might have been—that jobber might have been also what we consider not a legitimate distributor.

Q. Now, when you speak of a jobber selling your brands in a given territory at a price which would endanger the business of your company, the business of your brands—

A. Yes, sir.

887 Q. In what ways do you consider that the business of your company may be endangered by his so selling?

A. I think I have said—I think I have answered your question before, but I shall be glad to try and answer it again. The business of our company depends upon you consumers being able to get our products—

Q. Let me interrupt you, if you please. Does it depend also upon your ability to sell to your jobber customers?

A. Well, really it don't.

Q. But it has been the policy of your company to sell goods through jobbers?

A. Really, it don't, as applied to any particular jobber.

Q. Well, I am speaking of the company in its general policy.

A. We could not conduct our business if the jobber were eliminated; that is, under our present method of merchandising.

Q. So that you have in mind using the expression or a similar expression, to the effect that a jobber may endanger your business. You have in mind the idea that he might cause dissatisfaction among your other jobbers in the territory and thus endanger your business. Isn't that also in your mind?

A. Not dissatisfaction.

Q. Well—

A. Because many times our business is not endangered when there is great dissatisfaction among our jobbing customers.

Q. Well, your jobber customers, however, think that your business is endangered, or their business is endangered, when somebody in the community sells at better than they are selling, don't they?

A. No.

Q. Well, they have told you so?

A. Oh, they tell us so; yes.

888 Q. And don't you find that it is good business to confirm, as nearly as you can, consistently with the ideas of your distributors?

A. No, sir.

Q. You don't mean to say that you ignore their wishes altogether?

A. No, sir. I ask you to remember the statement that Mr. Hill made yesterday, Mr. Hill, senior, that in reality the tobacco business is benefited by the merchandising to the consumer at the lowest pos-

sible price because we sell more goods. Now, our business only begins to be endangered when either the retail dealer or the jobber does not make a living wage.

Q. And when you consider that the jobber does not make a living wage, who is doing business in a particular community, where is the danger to your business?

A. The jobber takes all the credit risks of all these retail dealers. As an example, I cited this morning the fact that we never put his prices down on drop shipments, but the jobber approving the credit of the retailer. We ship the drop shipments. It is impossible for us to conceive a business method by which we could ourselves handle in excess of one million retail accounts on credit risks alone, therefore the jobber must be the channel for the delivery of our merchandise as to that retail trade. If the jobber were wiped out in a given community we might sell the retail trade direct, a few of them, and the result is that you would walk four blocks for a cigar in-
889 stead of getting one on every corner, and I believe you would smoke less cigars in the course of a day.

Q. Now, do you feel that if, by reason of one particular jobber selling at less than the living profit in a given community, your other jobbers in that community will become disinterested in your brands? Do you feel that that would endanger your business?

A. It not only would, but on occasions it has. It has gone so far that sometimes jobbers have ceased handling legitimate—good wholesale houses have ceased to handle tobacco and tobacco products.

Q. And that, of course, is a thing that you do not relish?

A. We don't like that.

Q. And you attempt to avoid that wherever it is possible to avoid it?

A. And we attempt to avoid it.

Q. You said in one of your letters, I think it is in a letter, or you said in answer to a question asked you by Mr. Parker, that at a certain time mentioned in the letter, or specified in the question, your list of distributors was cleaner than it ever had been. Do you remember that?

A. Yes, sir.

Q. How did you cleanse your list of distributors?

A. Well, it is all very involved, but the facts are that this policy that I outlined this morning of fresh merchandise has not always been prevalent in the American Tobacco Company, and don't forget that a salesman is a man who sells goods, and he likes to get an order. Now there was a time in the American Tobacco Company, in the development of its affairs, when the realization of the
890 necessity of fresh merchandise going to the consumer was not as evident to the officials of the company as it is now. The result was that in many, many cases if an individual or a concern would give a large enough order to a field man, the influence of the receipt by the field man of that order was sufficient in itself to get that man on what we termed the direct business of the Ameri-

can Tobacco Company. For a period of time, of course, if that man did not have the outlet for the merchandise, the merchandise laid there and he did not repurchase, so it became evident to us that we had made a mistake in putting that customer on our list for the purposes of distribution. We have removed a great many of such accounts, and that, in particular, is what Mr. Harris (I think the letter was Mr. Harris's letter) was what Mr. Harris referred to when he said—used the word "cleansed." It particularly applied to section No. 3, the southern section. At one time, I think, sir, we took off two hundred accounts in the South.

Q. When was that?

A. Prior to any of this discussion, and for that purpose only.

Q. Do you know whether in 1921 there were sold by jobbers in this country what has been termed as war tobacco products?

A. Yes, sir.

Q. Those products also reached the hands of the retailer?

A. Unfortunately so.

Q. And were sold by the retailer to the consumer?

A. Unfortunately so.

Q. That fact had an effect on the tobacco industry in this country?

A. I think it had a very bad effect.

801 Q. Now, what was the effect?

A. Well, the effect was that you went in and bought a package of your favorite brand of tobacco; you expected to get it in good condition. As a matter of fact, it may have laid over in Bologne, in France, under a tarpaulin, gotten wet and rotten, and came back here and sold at a cheap price to a jobber, and by a jobber at a cheap price to the retailer and was sold to you under the misrepresentation of being fresh goods. Naturally, you, the consumer, were dissatisfied.

Q. Now, those war goods were sold at pretty cheap prices in this country compared with the prices at which retailers were selling fresh goods?

A. All damaged merchandise is sold at a cheaper price compared with good merchandise.

Q. Isn't it a fact that tobacco products, cigars, cigarettes, and other products, have been selling pretty cheap at retail for the last two years generally throughout the country?

A. Well, not as cheap—

Mr. PARKER. What was the question?

(The question was repeated by the reporter as above recorded.)

A. I don't think so; no, sir.

By Mr. SMITH.

Q. Haven't they sold pretty cheap at retail since the fall of 1921?

A. No, sir.

802 Q. You think not?

A. They are very much higher than they were sometime previous. You see, we pay—you don't realize it, but we pay six

cents to the Government on every package of Lucky Strike cigarettes that we sell.

Mr. SMITH. We realize that, of course.

The WITNESS. You realize that, and therefore they do not sell as cheaply as they did previously.

By Mr. SMITH.

Q. Mr. Hill, don't you know that in 1921, about the middle of 1921, Lucky Strikes were selling for twenty cents, nineteen cents, eighteen cents, at different places throughout the country?

A. Yes, sir.

Q. At retail?

A. Yes, sir.

Q. Don't you remember that in the fall of 1921 Lucky Strikes were selling for sixteen cents and seventeen cents?

A. Let me get straight on this—

Mr. PARKER. Let me ask that that question be read over.

(The question was repeated by the reporter as above recorded.)

Mr. PARKER. In the fall of 1921?

A. I really can not answer either question because of the diversity of price as applied to the country as a whole. For instance, I have just come back from the West, and the brands you
893 speak of are being sold out there at eighteen cents, two for thirty-five, I think, and in Philadelphia you can probably buy them at eleven or twelve cents a package.

Q. They are selling at two for a quarter in Philadelphia.

A. Two for a quarter.

Q. That is much less than they were selling for in the early part of 1921, isn't it?

A. I don't think so—in Philadelphia.

Mr. SMITH. Mr. Examiner, I have been furnished with circular 2727 of the American Tobacco Company, which concerns a drop shipment offer. This is a circular that Mr. Hill, who is now on the stand, referred to in his testimony to-day, as I understand it.

The WITNESS. Yes, sir.

Mr. SMITH. And I ask that this be marked "Commission's Exhibit No. 47."

The WITNESS. May I see that?

(Mr. Caldwell hands circular to witness.)

The WITNESS. You are correct, Mr. Smith.

(The circular was received in evidence and marked "Commission's Exhibit No. 47.")

By Mr. SMITH:

Q. Isn't it a fact, Mr. Hill, that in all of the offers of special deals made by the company to its jobber customers in 1921 the offer
894 applied only to retailers, and it was expressly stated in the circulars that the offer did not extend to sub-jobbers?

A. I believe so.

Q. Mr. Hill, on this question of standing orders, do I understand that it is the aim of your company to get its goods in the hands of the ultimate consumer as soon as possible after manufacture?

A. Yes, sir.

Q. Now, how soon after the manufacture of cigarettes would you say would be the proper time, or the time within which you would like to see the goods reach the consumer?

A. We would like to see the goods reach the consumer the next day, if it were possible.

Q. And I think you said that was one of the reasons why you liked to secure standing orders?

A. The only reason.

Q. Now, in the greater percentage of the standing orders, is it not a fact that as to the greater percentage of them the shipments are made weekly to your distributors?

A. I would not say so, sir; I think the greater percentage are biweekly—made twice a week.

Mr. PARKER. That is semiweekly.

The WITNESS. Yes; I think that is what we are endeavoring to secure.

By Mr. SMITH:

Q. Now, isn't it the policy of the American Tobacco Company to, in a degree, examine from time to time the stock of its jobber customers?

895 A. We do so every month; that is, it is our policy to do so every month. There are some territories where we have more customers than we are able to get around to within that period, and therefore it may take six weeks to two months.

Q. Now, do you do that for the reason, among others, that you want to see that your jobber customers have fresh stocks?

A. That is our sole reason.

Q. In your sales of your fastest selling articles to the jobber—and when I speak of fastest selling, I mean with reference to sales by the jobber—don't you find that the jobber buys about all he needs at the time, or that he has delivered to him, rather, all that he needs at that time for delivery to his trade, or does he anticipate to any degree?

A. That question to be properly answered would have to specify a certain trade condition. Now, for example, we have recently, all of us, experienced a great strike, a railroad strike, a coal strike. Immediately that the report of the coal shortage began to get around, immediately the report of railroad facilities being impaired began to get around, the jobber, the clever merchant, would lay in a larger stock than he would if transportation facilities were free; if there was any rumor of an increase in price, they lay in a larger stock.

Q. Yes; but now assuming, if it is possible to assume, that there will not be any strike in the mines or on the railroad, assuming normal times, what would you say?

896 A. I do not think I can answer your question; I can not;

I think it is a matter that the jobber knows, and it pertains to his business, and that I don't really know about. If you will repeat it, I will try.

Q. Now, take normal times with respect to the jobber who gets shipments twice a week—

A. Yes, sir.

Q. Either from the factory direct or from your warehouses to his place—

A. Yes, sir.

Q. Do you find that the jobber carries stock which is about sufficient to run him until his next shipment comes in?

A. No, sir.

Q. What is his condition in that respect?

A. In a general way a distributor carries approximately a thirty-day supply on hand of fast selling brands at all times; that is, in his warehouse; then he places his standing order for approximately the amount of his usage of that thirty-day supply that he has on hand.

Q. So that he always has on hand about a thirty-day supply?

A. Anywhere from a thirty to a sixty day supply he has on hand.

Q. He will deplete his supply with the orders that he secures and then replenish his supply with the shipments he gets from you under all standing orders?

A. That is my understanding.

Mr. SMITH. That is all.

Mr. PARKER. That is all.

(Witness excused.)

Mr. SMITH. Mr. Examiner, we served a subpoena upon Mr. D. H. Ball, whose name has been mentioned very frequently during the course of this hearing, to appear here at this hearing, and the subpoena required him to produce circular No. 1350 of the Lorillard Company, circular No. 1363 of the same company, circular No. 1369 of the same company, together with an original order to the company from the O. J. Moore Grocery Company, Sioux City, Iowa, and a copy of the reply to that letter made by the Lorillard Company, under date of August 29th, 1921.

Mr. CALDWELL. The attorney for the Lorillard Company states that Mr. Ball is and has been ill for some time past and offers in evidence a certificate of Dr. Walter S. Fleming, his attending physician, showing his physical inability to be present, and produces the circulars referred to in the subpoena, and with reference to the original letter of P. Lorillard Company from O. J. Moore Grocery

Company, Sioux City, Iowa, dated August 24th, 1921, and the reply of the Lorillard thereto, dated August 29th, 1921, states that search has been made in the files of the Lorillard Company and such letters can not be found and that Mr. Hollister, who is employed by the Lorillard Tobacco Company, is present with these circulars.

898 I will offer in evidence first the certificate.

Mr. SMITH. I do not know that the certificate in evidence will prove anything.

Mr. CALDWELL. It is a doctor's certificate.

Mr. SMITH. It merely shows a reason, if it does show any, why Mr. Ball has not appeared. I do not think that the certificate tends to prove or disprove any of the allegations in the complaint in this proceeding.

Mr. CALDWELL. It is not in reference to the allegations of the complaint, but is in answer to the subpoena, showing his inability to be present.

Examiner MCCORKLE. That is usually recognized in all courts; where a reputable physician sends in a certificate of ill health it is generally good grounds for absence.

Mr. SMITH. Well, Mr. Examiner, I want to call your attention to this certificate, if you please. I will read it—

Mr. CALDWELL. Let us put it in evidence.

Mr. SMITH. I will read it so that it will be there. [Reading:]

899 "October 30th, 1922."

It is written on the letterhead of Walter S. Fleming, M. D., 141 Rich Avenue, Mt. Vernon, N. Y.

"This is to certify that David H. Ball, of 329 East Sidney Avenue, Mt. Vernon, New York, was attacked by ptomaine poison from fish eaten on a train on September 14th, 1922, while on a trip to see his mother. That he was under my treatment from October 18th to October 24th. That I have given him directions as to treatment and diet, and suggested that he take a rest from business for two weeks and put himself under medical treatment at a sanitarium for that time."

Signed "Walter S. Fleming, M. D."

At the bottom of the paper: "Sworn to and subscribed by H. R. Loeb, notary public, Westchester County, October 30th, 1922."

Now, Mr. Examiner, the inference from this certificate is that on October 24th, which was the last day Mr. Ball was treated by this physician, he was advised to put himself on a diet and to take a rest from business for two weeks, to put himself under medical treatment. There is nothing in this certificate, not a thing,

900 which shows that Mr. Ball is not able to be here and testify. It appears that the last this doctor called on Mr. Ball was October 24th, and whether he is in a sanitarium does not appear from this certificate, and whether he is now ill does not appear from this certificate. I do not think it is any excuse. It would not be recognized as such in any court for nonappearance of Mr. Ball to this subpoena.

Mr. CALDWELL. The certificate states distinctly that he was under

treatment to October 24th, 1922, and that at that time he gave him directions as to treatment and diet, and suggested that he take a rest from business for two weeks, and put himself under medical treatment at a sanitarium for that time, and the two weeks has not yet expired.

Examiner McCORKLE. Do you know anything about him?

Mr. CALDWELL. Yes, sir.

Examiner McCORKLE. You believe he is ill?

Mr. CALDWELL. Yes, sir; I know he is ill.

Mr. SMITH. Where is he ill?

Examiner McCORKLE. You can get his testimony some other time, can you not?

Mr. CALDWELL. Yes, sir.

Mr. SMITH. Is he in a sanitarium?

Mr. CALDWELL. I offer it in evidence.

901 Examiner McCORKLE. Well, gentlemen, I think from the statement of the physician, I think it is a good excuse.

(Certificate received in evidence and marked "Respondent Lorillard's Exhibit No. 2.")

Mr. SMITH. Now, may we have those circulars?

Mr. CALDWELL. Yes, sir. Will you please put on the record that counsel has produced and handed to the counsel for the commission the Lorillard Circular No. 1350, dated May 25th, 1921, Circular No. 1363, dated July 21st, 1921, and Circular No. 1369, dated August 3rd, 1921.

RALPH P. HOLLISTER, was thereupon called as a witness, and having been first duly sworn, testified as follows:

Direct examination by Mr. SMITH:

Q. Mr. Hollister, are you employed by the P. Lorillard Company?

A. Yes, sir.

Q. How long have you been in the employ of that company?

A. Since December, 1911.

Q. What is your position there?

A. Why, clerical work, general work, office work.

Q. Are you an officer of the company?

A. No, sir.

902 Q. What title, if any, do you have?

A. I don't think I have any official title, possibly nothing more than a clerk in charge of one of the minor departments.

Q. Are you familiar with the circular No. 1369 of the Lorillard Company?

A. In what way do you mean, Mr. Smith?

Q. Are you familiar with its contents; did you ever see it?

A. Yes, sir.

Q. When did you first see it?

A. Why, approximately a couple of days previous or about the date of the circular.

Mr. CALDWELL. Which number was that?

Mr. SMITH. No. 1369.

The WITNESS. I think, if I recall rightly, about the early part of August.

By Mr. SMITH:

Q. Did you see the circular before it was issued to the trade?

A. Yes, sir.

Q. It was issued to the trade, was it not?

A. To a certain part of the trade.

Q. That is, No. 1369 was?

A. Yes, sir.

Q. To what part of the trade was No. 1369 issued?

A. It was mailed to, I think it is approximately nineteen States, jobbers in nineteen States.

Q. Did you have anything to do with the distributing of the circular?

A. Well, I had charge of the mailing of it.

Q. Now, what percentage of the jobbers of the Lorillard Company do you know is represented by the jobbers in the nineteen States to which the circular was sent?

A. Why I think, Mr. Smith, that that went to about 2,200 jobbers and I believe we had in the neighborhood of 7,800 to 8,000 names in the entire country.

Q. Can you tell us the names of the States to which circular No. 1369 was sent?

A. I can't from memory, but I can give you the States that it was mailed to—

Q. Mailed throughout New York State?

A. It was mailed to the New England States, New York State, that is, New York State outside of what is known as the metropolitan territory, southern Jersey, Pennsylvania, and I think Maryland, District of Columbia. If I had a list of the States I think possibly I could give it to you better, but I am giving it to you—

Q. Was it sent to Ohio?

A. It was not sent to Ohio; no, sir.

Q. Was it sent to Kentucky?

A. That I could not say right at the minute, Kentucky.

Q. Wisconsin?

A. Wisconsin I am in doubt of.

Q. Illinois?

A. I don't think that went to Illinois, I would not be positive on that, Mr. Smith, at the minute.

Q. Tennessee?

A. No; it did not go to Tennessee. I am positive it did not go to Tennessee; they were mostly the Eastern States, east of the Mississippi River, with the exception of West Virginia, Ohio, Michigan, Indiana; I know those three were excepted on that.

Q. Now, do you remember the issuance of circular No. 1363?

A. There were two of them; yes, sir.

Q. Now, did you distribute that circular?

A. Yes, sir.

Q. To what part of your trade did you distribute it?

A. One of them, 1363, was mailed to Ohio about the early part of—give me the first date, will you, Mr. Smith, on the first one?

Q. July 21st the 1363.

A. What is the other date?

Q. The other date was 1369, is August 3rd.

A. No, you said you had two circulars No. 1363 there.

Q. I did not say that.

A. Then I misunderstood you.

Mr. CALDWELL. What is the date of that?

Mr. SMITH. July 21st.

The WITNESS. July 21st, that was mailed to the Western States, west of the Mississippi River, with the exception of the States in the far west, there were nineteen States that was mailed to.

By Mr. SMITH:

Q. Now, would you say that all your distributors throughout the country received either circular No. 1363, dated July 21st, 1921, or circular No. 1369, which was dated August 3rd, 1921?

A. They did not.

905 Q. What percentage of the trade would you say did not receive either of those circulars?

A. I think there were eleven or twelve States including—that is counting the forty-nine States—forty-eight States and one Territory, there were about twelve that did not get either of these circulars.

Q. Now, do you know which of those twelve States did not get the circulars or either one of them?

A. West Virginia didn't get that, Virginia, Tennessee, Mississippi, Alabama, Georgia, Florida, North and South Carolina.

Q. You mean that none of the States you have just mentioned were among the States to which you sent either circular No. 1369 or circular No. 1363?

A. We did not send either of those circulars to those States. In fact, I believe there is also some of the Coast States we did not send to, that is, California, Washington, Oregon, and those States there.

Q. Do you remember the issuance of No. 1350?

A. Yes, sir.

Q. When did you first see that circular?

A. I should say approximately about the 23rd or 24th of May.

Q. That was about a day or two before it was issued?

A. Yes, sir; generally I get them—sometimes I have had circulars given to me in the morning and gotten out that night; I generally have them a day or two to arrange for the mailing of them and to have them printed.

Q. Did you issue circular No. 1350 for your company?

A. Yes, sir.

906

Q. And when was that issued?

A. It was mailed out, I think, May 25th, 1921.

Q. You think it was mailed out the day of its date?

A. Yes, sir; that was our custom, to mail them out that day or possibly the night before, in some instances, where we wanted the trade to get them on that day.

Q. Where did you mail circular No. 1350 to?

A. To the distributors in the State of West Virginia only.

Q. Do you know why you sent circular No. 1350 only to jobbers in West Virginia?

A. Why, that was the instructions given to me with that circular.

Q. No reason was given to you for sending the circular only to West Virginia?

A. No, sir.

Q. Didn't that strike you as being peculiar?

A. Oh, no.

Q. Why not?

A. Why, every circular that is given to me, is given to me for a special territory, our circulars apply to sections, and only to sections. Very often—sometimes it is a general circular.

Q. Were you instructed to send circular No. 1363 only to certain sections?

A. Certain section; yes, sir.

Q. And were you given similar instructions as to No. 1369?

A. Yes, sir.

Q. Who gave you those instructions?

A. I could not tell you; I could not tell you, Mr. Smith.

907 Q. Do you know who gave you the instructions to send circular No. 1350 only to West Virginia?

A. No, sir.

Q. Did you ever send out circulars before of general import only to the trade in West Virginia?

A. Yes, sir.

Q. Do I understand you to say, Mr. Hollister, that you are a clerk in the office?

A. Well, practically a clerk; I have charge of the mailing of the circulars, among my other duties.

Mr. SMITH. I offer in evidence, Mr. Examiner, the circular No. 1350, and ask that it be marked "Commission's Exhibit No. 48."

Mr. CALDWELL. Now, I object to this circular being received in evidence on the ground that it affirmatively appears that it was mailed to the State of West Virginia, was mailed to the jobbers in the State of West Virginia only, and it does not apply to the territory specified in the complaint in the pending action, and can not be considered as a part of any conspiracy or unlawful act, or violation of the act appointing the Trade Commission, and is incompetent, irrelevant, and immaterial to any issue in this pending suit.

Mr. SMITH. Mr. Examiner, while this witness has testified this circular was distributed only to the jobbers of the Lorillard Com-

pany located in West Virginia, the circular by its terms,
 908 announces a policy of the Lorillard Company not confined to
 West Virginia, but a policy general throughout the country.
 There is absolutely nothing in the circular, not a word, not a thing,
 to indicate that the policy of the company, as outlined in the circular,
 will be directed only to West Virginia. On the other hand, the
 inferences to be gathered from this circular are that the circular
 embodies a general policy of the Lorillard Company, and for that
 purpose it is perfectly admissible, and I think should be admitted
 here and marked "Commission's Exhibit No. 48."

Mr. CALDWELL. In reply to that, I desire to state that the testi-
 mony is directly to the contrary, as now testified by this witness,
 that this was a policy of the company which pertained merely and
 only to the jobbers in the State of West Virginia, has no connection
 with the general policy, and as proven by the other circulars to
 which reference has been made, was not the policy of this company
 in other localities, and that it would be improper to receive such a
 circular and to give it an import of a policy in Philadelphia, when
 it is plainly shown by the testimony that it was not applicable to
 that territory or that vicinity.

909 Mr. CALDWELL. I ask your honor to withhold your decision
 now until you get these other circulars.

Examiner McCORKLE. I will let it go in for the present. If I see
 later on—

Mr. CALDWELL. You can not see any more than you are seeing
 now, from the testimony of this witness, that is it did not go
 through.

Examiner McCORKLE. I think I will have to let it go in.

Mr. CALDWELL. Upon what ground does your honor let it go in?
 That it is relevant?

Examiner McCORKLE. I do not think the gentleman ought to
 argue with me now.

Mr. CALDWELL. It is a serious matter, your honor. I am trying
 to get your honor to exclude a paper that does not pertain to this
 suit.

Examiner McCORKLE. It would not do your company any good
 even if I should rule it irrelevant. Mr. Smith would insist it go in
 and the commission pass upon it.

Mr. CALDWELL. That would not matter how much he insisted.

Examiner McCORKLE. It is flattering to me to have you argue to
 rule it out, because I could merely express an opinion.

Mr. CALDWELL. I thought you had to rule on things and not
 merely to take anything and everything that was offered.

910 Examiner McCORKLE. I do, if the lawyers become very
 insistent I become a little bit shaky about not letting it go in,
 because I might be wrong.

Mr. CALDWELL. Your honor has the right to defer your decision
 until later.

Examiner McCORKLE. I will say, without passing at all on the value of the testimony, that I will permit it to be introduced at present.

Mr. CALDWELL. Exception.

(Marked "Commission's Exhibit No. 48.")

Mr. CALDWELL. I move to strike out this exhibit on the same grounds on which I have opposed its being received in evidence.

Examiner McCORKLE. Motion overruled.

Mr. CALDWELL. Exception.

Mr. SMITH. Circular No. 1363, Mr. Examiner, I also offer, and ask it be marked "Commission's Exhibit No. 49."

(The circular referred to was received in evidence and marked "Commission's Exhibit No. 49.")

By Mr. SMITH:

Q. I show you commission's Exhibit No. 11; that is, your circular No. 1369, Lorillard circular No. 1369, concerning which I just asked you and concerning which you made replies to my questions.

911 Mr. CALDWELL. There is the one that went to Philadelphia.

By Mr. SMITH:

Q. I call your attention to commission's No. 11, which is circular No. 1369. That circular purports to quote, does it not, your circular of May 25, 1921, which is No. 1350, and known in this proceeding as commission's No. 48.

Mr. CALDWELL. I object to that question, that the two exhibits speak for themselves, as to what they purport to quote.

Mr. SMITH. There is connection, Mr. Examiner, by explicit reference to No. 1350 and 1369.

Examiner McCORKLE. It may be an opinion, but you can answer the question.

Mr. CALDWELL. The only way I see you can answer a question of that kind is to have a reading of both circulars and the circulars speak for themselves and constitute the best evidence. Suppose he says yes or no—

Examiner McCORKLE. That is true of every exhibit. At the same time there may be possible comment.

Mr. CALDWELL. I say that this witness should not be called upon to express a conclusion.

Examiner McCORKLE. Overruled.

912 By Mr. SMITH:

Q. Mr. Hollister, I call your attention to commission's Exhibit No. 11, which is circular No. 1369. That circular purports to quote, does it not, your circular of May 25, 1921, which is No. 1350, and known in this proceeding as commission's Exhibit No. 48.

Mr. CALDWELL. I further object to it on the grounds that this witness is merely a mailing clerk and not an officer of this company, and he is not competent to pass upon this question.

Examiner McCORKLE. Let me ask, when you say "purports to quote," is there any statement there they are quoting from?

Mr. SMITH. Yes, it says, Mr. Examiner, "To our customers." It says, "We beg to quote herewith the letter sent out on May 25, 1921, to many sections which outlines our position, I think, quite clearly," and then makes the quotation, "May 25, 1921. To our customers."

Mr. CALDWELL. I call your honor's attention to the fact that that letter is not an identical letter to the letter of the 21st of May.

Mr. SMITH. I object to that.

Mr. CALDWELL. I have a right to object.

Mr. SMITH. You have a right to object, but you have not a right in your objection to tell the witness what answer he should make to this question.

913 Mr. CALDWELL. I do not propose to tell the witness, but I propose that the court rule that the witness shall not answer the question. I call attention to the fact that those circulars speak for themselves, and they say whether or not it is a correct quotation. Whether one is a correct quotation of the other.

Examiner McCORKLE. I rule that the question is proper.

Mr. SMITH. Let me state, Mr. Examiner, that the question has been misunderstood anyway by Mr. Caldwell. I will ask the question be repeated for the benefit of the witness.

(The question was then read by the reporter as above recorded.)

Mr. CALDWELL. I again repeat my objection.

The EXAMINER. He may answer that question.

A. I could not say, Mr. Smith.

By Mr. Smith:

Q. Now, I ask you what circular is referred in circular No. 1369 when the introductory paragraph of circular No. 1369 reads as follows: "To our customers: Having received many inquiries from jobbers generally as to what the attitude of this company is in reference to the jobber receiving a legitimate profit for handling and
914 distributing merchandise of this company's manufacture, we beg to quote herewith letter sent out on May 25, 1921, to many sections which outlines our position, we think, quite clearly; 'May 25, 1921. To our customers.'" I ask you, Mr. Hollister, what circular of the Lorillard Company is quoted in circular No. 1369, known as commission's Exhibit No. 11 in that part of circular 1369 which is between the quotation marks, what circular of the Lorillard Company is there quoted?

Mr. CALDWELL. I object to it on the same grounds and if any circular is quoted, the circular that he now has in his hands, No. 1369, speaks for itself.

Examiner McCORKLE. Objection overruled. Go ahead and answer the question.

A. I could not say, Mr. Smith, because I did not make it up. I could not say what that circular is quoted from.

By Mr. SMITH:

Q. Were there any circulars issued by the Lorillard Company in May, June, July, or August, 1921, to its customers that you yourself did not distribute?

A. To my knowledge, there may have been; not through me.

Q. You say that there may have been other circulars that were not distributed?

A. I meant letters; circulars all go through my hands with the number on.

Q. Were there any circulars by the Lorillard Company to its customers during May, June, July and August of 1921, that you did not distribute for your company?

A. Not that I know of.

Q. When the circular dated May 25, 1921, known as commission's Exhibit No. 48, is the only circular, is it not, which was issued on that date by the Lorillard Company?

A. Now, I could not answer you that, Mr. Smith, because I may have sent some other circulars out on May 25.

Q. Or you may have sent circular No. 1350 to other persons than those you have named?

A. No; circular 1350 was only mailed to the jobbing trade in the State of West Virginia.

Q. Do you say now that there may have been another circular issued by the Lorillard Company to its customers on May 25, 1921?

A. There may have been. Sometimes I have as many as 12 circulars sent out in one day.

Q. Have you searched for copies of circulars issued by your company to your customers in May, June, July, and August, 1921?

A. No, sir; only for these particular circulars that you asked for.

Q. You looked only for these?

A. Yes, sir.

Q. It may be then, that circulars of the same substance as circular No. 1350 were sent by the Lorillard Company on days other than May 25, 1921. Is that what you mean to say?

Mr. CALDWELL. One moment. I object to that on the ground it is calling for a comparison, calling for circulars of the same substance. It is incompetent, irrelevant, and immaterial, and not within the knowledge of this witness.

Examiner McCORKLE. Overruled.

A. I could not say without referring to all the circulars between that time, Mr. Smith, because I do not keep the contents in my mind.

Q. But as far as you know, it is possible that this same circular, that is, the substance, was issued on dates other than May 25, 1921?

A. It is possible; yes, sir.

Q. And it is possible also that a circular also similar in substance to circular No. 1350 was issued on a day other than May 25, 1921, to distributors in States other than the State of West Virginia?

A. It is, sir.

Mr. CALDWELL. I object to what is possible as not forming any evidence at all, and I move to strike it out, your honor.

Examiner McCORMICK. He says he is not certain about it. It may be possible. That is correct; I mean that is a proper answer, I think.

Cross-examination by Mr. CALDWELL:

Q. Mr. Hollister, is the mailing department your department in the Lorillard Company?

A. Well, that is, the mailing comes under my jurisdiction; yes, sir.

Q. The mailing of circulars?

A. Yes, sir.

Q. And did you have anything whatsoever to do with the formation or wording or getting up of the circulars?

A. No, sir.

917 Q. As I understand, all you have authority to do is to send out circulars to whatever section of the country you are instructed to mail them to?

A. That is correct.

Q. So far as the contents of the circular is concerned that does not interest you in any way, shape, or form?

A. No, sir.

Q. You do not pretend to carry the contents of any circular in your mind?

A. No, sir.

Q. I understand you to state that circular No. 1350 was mailed only to the jobbers in the State of West Virginia?

A. Yes, sir.

Q. About how many of such circulars, No. 1350, did you mail?

A. About 170 copies.

Q. One hundred and seventy copies?

A. Yes, sir.

Q. Were any copies of circular No. 1350 mailed to Philadelphia or the vicinity?

A. No, sir.

Q. In the circular of May 25, 1921, circular No. 1350, commission's Exhibit No. 48, appear among others these words, "We trust it will be your pleasure to cooperate with us in preventing that which is undesirable." I ask you now to refer to a circular, No. 1369, commission's Exhibit No. 11, and state whether or not those words appear in said circular No. 1369 anywhere.

Mr. SMITH. Mr. Examiner, that is the question which I asked the witness, to which objection was raised. I just want the record to show that I do not make any objection to this question.

A. No, sir, it does not appear in 1369.

918

By Mr. CALDWELL:

Q. And no circular containing those words which I have just quoted was sent to Philadelphia or vicinity?

Mr. SMITH. I object to that question, Mr. Examiner, because the witness has shown that all of the circulars issued by the Lorillard Company may not have been seen by him.

A. Mr. Smith, if you have that impression, that is wrong—all the circulars. I did not say letters. I said all of the circulars go through my hands but no letters; any letters that go out I do not have anything to do with.

By Mr. CALDWELL:

Q. And there was no circular that was issued by the Lorillard Company with those words on it, that were mailed to Philadelphia or vicinity?

A. Not to my knowledge.

Q. And you have knowledge of the circulars that were issued?

A. Of all the circulars that were sent out.

Q. Did you cause search to be made in the Lorillard office for the original letter to P. Lorillard Company from O. J. Moore Company, Sioux City, Iowa, dated August 24th, 1921, and the alleged copy of a reply by the Lorillard, dated August 29, 1921, as requested in the subpoena issued to Mr. Ball?

A. I did.

919 Q. Were any such found?

A. I could not find anything of those dates at all.

Redirect examination by Mr. SMITH:

Q. When did you last see Mr. Ball?

A. When did I see Mr. Ball?

Q. Last.

A. To-day is Wednesday. Two weeks ago yesterday I saw him last?

Q. Where?

A. Why, in the office.

Q. Have you been talking to him over the telephone since that time?

A. I talked with Mr. Ball a week ago last Friday morning over the telephone.

Q. Where was he at?

A. Why, I think he telephoned from Mount Vernon. I could not swear to that.

Q. That is his home?

A. Yes.

Q. How did you learn that the commission had called upon Mr. Ball to produce these letters that you were asked about?

A. The subpoena was shown to me.

Q. Who showed the subpoena to you?

A. Mr. Caldwell.

Q. When?

A. I think it was yesterday morning.

Q. How do you classify these papers which are in evidence and known as Exhibits 11, 48, and 49, respectively? Do you classify those as letters or circulars?

A. Circulars.

Q. All of them are circulars?

A. All of them are circulars.

Q. What circulars of this nature are issued that go to any of your sales force?

920 A. Copies are sent usually to our salesmen in the State where the circular is mailed.

Q. Are they sent to anybody else in connection with your staff?

A. Not outside of our office people; that is, department heads get a copy.

Q. Who are the department heads that are furnished copies of the circulars?

A. The sales managers and the officers; the heads of the different departments and the auditing department come under the auditing head. The officers of the company; and we also sent copies to the factories for their information.

Q. You would say then that those people whom you have just named received copies of circular No. 1350?

A. To the best of my knowledge, they did; that is, they were handed to them, not mailed, handed around in the office.

Q. Can you tell us how the selling organization or the selling part of your organization is constituted?

A. No, sir; I could not, Mr. Smith.

Q. Do you know how the sales officers are classified?

A. In what manner, as to titles?

Q. Territory.

A. Well, I could tell you the territories.

Q. Does your company divide the country in sections?

Mr. CALDWELL. I object to this witness attempting to state anything that his company does that is beyond the scope of his authority. He is here merely only as a clerk in the office in charge of the mailing department.

921 Mr. SMITH. I am not asking about his authority. I am asking about his knowledge.

Examiner McCORKLE. Proceed to answer, if you can.

A. Only so far as it pertains to the business I look after in addition to this, that is, matters that I handle.

By Mr. SMITH:

Q. Do you have a general sales manager?

A. No.

Q. Who is the head of your selling department?

A. Why, the selling end of the business is looked after by three vice presidents.

Q. And who are they?

A. Mr. Ball, Mr. Bell, and Mr. Hummel.

Q. And are they all located in New York?

A. Their offices are in New York. I do not know if they live in New York.

Q. They live close to New York?

A. Yes, in some suburban towns.

Q. As to West Virginia, do you have any directing head of the salesmen working for your company in West Virginia?

A. It comes under a sales manager.

Q. Who is he?

A. West Virginia?

Q. Yes.

A. Mr. E. J. Bush.

Q. And where was he located in West Virginia?

A. Do you mean now or at that time?

Q. At that time.

A. Mr. Bush was not there at that time.

22 Q. Who was there at that time?

Mr. CALDWELL. What does "that time" mean?

Mr. SMITH. At the time of the issuance of this circular.

A. May 25. That was another—our organization at that time, Mr. Smith, was different than it is to-day. We have these general sales managers to-day, where a year ago we did not. We had different departments and each department had its own force.

Q. As of May 25, 1921, what was the situation with respect to your company?

A. I think there were several selling forces in that State.

Q. By "several selling forces" do you mean—

A. I mean representing different lines, one representing cigars, another tobacco, and another cigarettes.

Q. Was there any one man who had control over all of the activities of the company in West Virginia?

A. Well, through these three vice presidents. They were in control of them.

Q. And they were located in New York?

A. Yes, sir.

Q. Did you send copies of this 1350 to your selling organization in West Virginia?

A. To the head men, that is, the head salesmen in that territory.

Q. Did you send this circular to your factories, that is, the circular No. 1350?

A. I think it was.

23 Q. Where are your factories?

A. We have a factory at Jersey City, Marrión; we have a factory at 71st Street.

Q. Seventy-first Street, New York?

A. New York; and I think there is one at 154th St., New York. There is one in Richmond, Virginia. I think there was one at that time at Danville, Va.

Q. Are there any other places where your company had factories in 1921?

Mr. CALDWELL. I object to this witness testifying unless he is called upon to testify from personal knowledge, and the only way this witness could know from personal knowledge as to whether the factories are located at these various places is by going there, it seems to me. This is a mere clerk in an office, your honor.

EXAMINER MCCORMICK. I know; but he knows some things.

Mr. CALDWELL. I will ask your honor to instruct him to only answer such things as he knows of his own personal knowledge.

EXAMINER MCCORMICK. I will instruct him if he does not know these things, if he never heard someone in authority down there say that they had a factory in Danville, Va., or some place like that, not to answer it; but if he has heard anybody who knows and who
924 has got the right to speak of owning a factory, why, I will consider that he has knowledge of it.

Mr. SMITH. I think when the witness testifies he sent copies of these circulars to his factories he certainly knows where his factories are located.

Mr. CALDWELL. I have no objection to his saying where they mailed them to.

A. Those were the places they were mailed to. I do not know—we may have other factories that we did not mail to; but those are the factories where they were mailed.

By Mr. SMITH:

Q. Were there any other factories that you mailed the circular 1350 besides those which you have given?

A. Not to my knowledge, Mr. Smith.

Q. When you gave circular 1350 to the officers of the Lorillard Company, did you give them only one circular, or did you give them copies?

A. Just one copy, passed around amongst the officers. That, Mr. Smith, has the notation, the copy you have with the notation is the one which is passed around; not the circular as it is mailed out to the trade. Here it is, here.

Recross-examination by Mr. CALDWELL:

Q. You have stated that circular No. 1350 was mailed to different factories. I offer in evidence circular No. 1350, and ask you if
925 that is the copy of the one that was mailed to your factory?

A. Yes, sir; passed around to the officers and mailed to the factories with notation.

Mr. CALDWELL. I offer this in evidence.

Mr. SMITH. With notation of what?

The WITNESS. Where the circular was mailed to.

(The circular was received in evidence and marked "Respondent Lorillard's Exhibit No. 3.")

By Mr. CALDWELL:

Q. You had a notation on the circular that it was mailed to certain places?

A. Only to the office force. The circular mailed out to the trade is as you have offered it in evidence, but for the office we had it with the notation.

Q. In other words, the circular as you mailed it out—

Mr. CALDWELL. I have not finished, Mr. Smith, if you will excuse me.

Mr. SMITH. I did not know you had a right to offer in evidence, anyway during the examination of my witness, your own papers.

Mr. CALDWELL. Why not? I have the right to cross-examine the witness.

By Mr. CALDWELL:

Q. I call your attention to circular No. 1350, being respondent Lorillard's Exhibit No. 3, and being circular dated May 25, 1921, and ask you if the notation thereon quoted as follows, "Mailed to West Virginia only," was on that circular when issued May 25, 1921?

A. It was on there. The copies are run for the mailing to the jobbers, and then the form is taken off the multigraph we run the notation on and run it at the same time for passing around the office.

Q. As I understand this Lorillard Exhibit No. 3, circular No. 1350 is identical with the commission's Exhibit No. 48, with the exception of the words "Mailed to West Virginia only."

A. That is the only difference.

Q. And does that sentence on there, "Mailed to West Virginia only," indicate that the commission's exhibit just referred to was mailed to West Virginia only?

A. That is right.

Redirect examination by Mr. SMITH:

Q. Mr. Hollister, the circular that was mailed to the trade, No. 1350, known as commission's Exhibit No. 48, did not have on it, did it, the expression appearing in respondent Lorillard's Exhibit No. 3?

A. The one mailed to the trade did not. The ones in the office and the sales force had the notation on it.

Q. The one mailed to the trade is No. 48.

A. Is No. 49.

Colloquy between examiner and counsel

Mr. SMITH. Mr. Examiner.

Examiner MCCORMICK. Yes, sir.

927 Mr. SMITH. Mr. Taulane, who represents some of the respondents in this proceeding, told me in Philadelphia if I

sent him a proper stipulation, covering the organization of the different Philadelphia firms constituting the association he would sign it, so that it would be unnecessary to prove the constituent membership of partnerships and the names of the officers of the respondent firms.

I am about to state that I rest this case with the notice, however, that I reserve the right in case Mr. Taulane and I cannot agree on the things that I have suggested, I will have to re-open the case to prove the organization of the different firms who constituted the association. With that reservation I state that this case is rested with the probability that if my superiors so direct, I shall ask to have the case re-opened for the purpose of taking the testimony of Mr. Ball.

Examiner McCORKLE. Not re-opened because we are not closing it.

Mr. SMITH. That is, to re-open my case in chief. It seems to me, however, that it is not necessary to call Mr. Ball. My superiors may disagree with me, and of course, I shall have to be guided by their direction and suggestion. With these reservations that I have made, we rest.

Examiner McCORKLE. What about the respondents, gentlemen?

928 Mr. CALDWELL. In reference to Mr. Ball, I would like to ask that when this matter is adjourned here today it be adjourned to some definite period, so that we can resume and take the testimony of Mr. Ball if it is desired to do so, and preferably here at New York. I want to have the opportunity of examining Mr. Ball, putting his testimony on, if we think it is necessary to do so, and I am perfectly willing to accord Mr. Smith the privilege that he asks of opening this case for that purpose. Both Mr. Smith, and myself, I think, want Mr. Ball.

Examiner McCORKLE. Those are matters we will settle outside, as to where we will meet and whether you will introduce Mr. Ball or not.

Mr. SMITH. I think, Mr. Examiner, that what is troubling Mr. Caldwell is the proposition as to whether I will want to call Mr. Ball. Now, unless I suggest to Mr. Caldwell within the course of the next two weeks that we will want Mr. Ball's testimony, he may consider that I will not call Mr. Ball.

Mr. CALDWELL. May I ask, instead of doing that, if you want Mr. Ball, that you write a letter to Mr. Ball within two weeks, because I will be away from here.

Mr. SMITH. I will be with you.

Mr. CALDWELL. All right; we will arrange it. I ask, your honor, on behalf of the Lorillard, that the hearing be not closed
929 but be adjourned to some future date so that we can determine, if Mr. Smith does not want Mr. Ball, as to whether we ourselves will put him on the stand.

Examiner McCORKLE. Can you make any statement whether you have any further testimony outside of Mr. Ball, so we know how near the case is through, how near it is finished?

Mr. CALDWELL. My own judgment at the present time is that I would not expect to call anybody else than Mr. Ball, even if I call Mr. Ball, because I do not think that there has been any case made out against the Lorillard.

Examiner McCORKLE. What about the American Tobacco Company, gentlemen?

Mr. SMITH. Mr. Examiner, my opinion is that it is not necessary for us to call Mr. Ball because even without our calling him we contend that the case has been established against the Lorillard Company.

(Adjourned by agreement, subject to call of the examiner.)

930 BEFORE THE FEDERAL TRADE COMMISSION

FEDERAL TRADE COMMISSION

VS.

WHOLESALE TOBACCO & CIGAR DEALERS ASSOCIATION of Philadelphia.

} Docket No. 886.

ROOM 2301, FEDERAL TRADE COMMISSION,

Washington, D. C., November 28, 1922.

Met pursuant to adjournment, 11.45 a. m.

Before George McCorkle, examiner.

Appearances: Edward L. Smith (Washington, D. C.) and Edwin B. Haas (Washington, D. C.) for the Federal Trade Commission; Messrs. Caldwell & Bannister, attorneys for respondent Lorillard Tobacco Company, by Charles Caldwell, of counsel; John Walsh and J. H. Holmes, attorneys for respondent American Tobacco Company.

931 Mr. SMITH. Mr. Examiner, the commission's case in chief in this proceeding was closed in New York on November 1st. The time and place for the introduction of testimony in behalf of the American Tobacco Company was to be agreed upon, and we have agreed upon to-day, at this time and at this place, for the production of the testimony in behalf of the American Tobacco Company, and I understand the American Tobacco Company intends to offer some testimony in its behalf.

Mr. WALSH. The statement of Mr. Smith is correct, and at this time we offer Mr. Bevill for cross-examination in reference to a letter concerning which you questioned him.

Mr. SMITH. It seems that we ought to have a common understanding about this situation; Mr. Walsh suggests he is introducing Mr. Bevill for the purpose of cross-examining him, but I understand he offers him as a direct witness.

Examiner McCORKLE. It does not make any difference one way or the other.

Mr. SMITH. With that understanding, it is all right. I want to examine him.

Mr. WALSH. It is all right if we put it this way, for cross-examination; then the American Tobacco Company does not have any testimony at all.

Mr. SMITH. As long as I have the right to cross-examine, it is all right.

932 J. B. BEVILL was called as a witness, and having been heretofore duly sworn testified as follows:

Direct examination by Mr. WALSH:

Q. Mr. Bevill, you testified before in this proceeding?

A. Yes, sir.

Q. In order to refresh the memory of the examiner and counsel in this case, will you tell us just what your business is with the American Tobacco Company and has been for the past few years?

A. In title I am a section sales manager for section No. 2 for the American Tobacco Company.

Q. What territory does that cover?

A. It embraces—do you want the States?

Q. Yes.

A. It starts at Pennsylvania—

Q. The State of Pennsylvania, including the city of Philadelphia?

A. Yes; Pennsylvania, Maryland, District of Columbia, Virginia, West Virginia, Kentucky, and several counties in North Carolina.

Q. Where do you have your headquarters?

A. In New York.

Q. In 1921 what position did Mr. T. F. O'Boyle occupy?

A. The position as field sales manager.

Q. And he was acting under your direction?

A. Yes; as assistant to me in eastern Pennsylvania in the headquarters at Philadelphia.

Q. There was introduced in this proceeding at the time
933 of the taking of the testimony of Mr. James Murphy on October 20, 1922, commission's Exhibit No. 22, and I show it to you now and ask you if you wrote that letter to Murphy Brothers [handing paper to witness]?

A. Yes, sir.

Mr. WALSH. Please mark this paper as commission's Exhibit—

Mr. SMITH. I think all the exhibits are here, aren't they?

Examiner MCCORMICK. No, sir; I have not them; I have the docket here, I do not think there are any exhibits in this docket.

Mr. SMITH. We will have it marked Respondent's Exhibit No. 5.

(Paper referred to marked "Respondent's Exhibit No. 5.")

By Mr. WALSH:

Q. I understand from you that you did write this letter which appears as respondent's Exhibit No. 5?

A. Yes, sir.

Q. And I ask you whether or not you are familiar with the American Tobacco Company's circular No. 2748 which now appears in the record in this proceeding as Exhibit No. 5 (handing paper to the witness)?

A. What was your question?

Q. I asked if you are familiar with this circular No. 2748, which is the respondent's Exhibit No. 5?

A. Yes, sir.

934 Q. Does this circular No. 2748, which is respondent's Exhibit No. 5, refer to what is commonly called a deal.

A. Yes, sir.

Q. And a deal is an offer, as I understand it, made by a tobacco manufacturer to its customers making special arrangements relative to the selling of tobaccos and cigarettes; is that true?

A. Partly true.

Q. What is a deal?

A. A deal is an inducement.

Q. For what?

A. For instance, in that one we wanted to accomplish—we were marketing at the time the brand of One-Eleven, and to get the distribution, to give a sure distribution we put the deal on, we put twelve cartons in the deal, and in addition we would allow one hundred Sweet Caporals over for each deal he bought.

Q. The distribution of the brand One-Eleven was made in accordance with the deal as prescribed in this circular No. 2748?

A. Very largely so.

Q. I noticed in paragraph 3 of circular 2748 there is this language: "This offer does not apply on goods bought for the stocks of our direct customers or sub-jobbers or on shipments to retail departments of either, but is for the benefit of the retailers only." Was that arrangement adhered to in the carrying out of effecting of this deal as set forth in circular 2748?

A. It was.

935 Q. Did you, for the American Tobacco Company, make adjustments with your customers under the provisions of Circular 2748?

A. Yes, sir.

Q. How did you go about it? Who made claim for special inducements or consideration under this deal?

A. Under that deal there is a form on which the jobber reports to the American Tobacco Company each individual deal he sells and to whom he sells it.

Q. Is that a form furnished by the American Tobacco Company?

A. Yes; that is furnished by the American Tobacco Company, and it is filled in by the jobber showing the quantity sold, to whom sold, and the amount of gratis goods he gave. We, in turn, take that and send him a check covering the gratis. When all these forms came in we noticed so many that were in excessive amounts—

Q. What do you mean by "excessive amounts"?

A. Very large amounts.

Q. What did they run up to?

A. In other words, from fifty to two hundred deals.

Q. How much would that aggregate in money?

A. Every deal would approximately amount to 85 cents, so, if there were a hundred deals, it would be a matter of \$85.00 due the jobbers. Those were referred to my desk and I recognized them through my knowledge of conditions as be sub-jobbers and not retailers and such slips were returned to the Philadelphia jobbers with the advice that it did not apply to the sub-jobbers.

Q. That is, you advised them that it did not apply to sub-jobbers in accordance with paragraph 3 of the circular?

A. That is correct.

936 Q. What were the circumstances which prompted you to write this letter of March 19, 1921, which is commission's Exhibit 22, to Murphy Brothers; I call your attention to this: "I understand, that according to your association agreement there are no recognized sub-jobbers in the city of Philadelphia." Why did you write that, Mr. Bevil?

A. Mr. Walsh, I would like to tell you that that is not an individual letter; it may be addressed to an individual, but it went to practically every jobber in the city of Philadelphia. When we turned down their forms—

Q. How do you mean, "turned them down"?

A. Refused to allow the gratis; refused to send the jobber a check because he violated that paragraph of our circular, and it created an awful uproar; they were very much dissatisfied, and I went to Philadelphia and made a personal investigation and had Mr. O'Boyle assist me very largely, and every statement made to us by those that we called on, so-called violators of that paragraph, and statements that they had agreed that there were no more sub-jobbers, that they were selling to parties—they made no distinction between sub-jobbers and retailers; they were selling all on the basis of list plus eight per cent.

Q. That was the information that you received?

A. That was the information that we received.

Q. What kind of a settlement did you make when you received that information?

A. On the basis that they were not sub-jobbers, but retailers.

937 Q. But they were claiming this gratis for sub-jobbers by reason of the fact that they had sold sub-jobbers which they were not entitled to receive, because they did sell to sub-jobbers?

A. Yes; but they said they were not sub-jobbers; they went on record that there was no distinction any more in the City of Philadelphia.

Q. How did you say you got this information?

A. That information was gotten very largely through personal investigation, on the investigation of Mr. O'Boyle, by calling on a great number of these jobbers who had reported so-called sub-jobbers.

Q. Then, you say in here further: "And I further understand that you treated all so-called sub-jobbers on exactly the same as you did the retail trade, considering them only in the sense of retail merchants and sold according to your agreed price at list less 8 per cent." Why did you write that, Mr. Bevill?

A. I was endeavoring to repeat the actual statement which they made to me so that in every instance I could protect the company in this paragraph and in every circular we issued. I wanted to go just as far with them in their own words in my letter as to whether they got their check or not for the rebate; they all went on record that they were no sub-jobbers, but retailers, and were sold on that basis.

Q. It was a proposition, then, of saving money to your company?

A. Absolutely. Had we allowed that deal to sub-jobbers he would have owned his merchandise cheaper than to direct account.

938 Mr. WALSH. I would like to have this letter dated March 30, 1921, marked for identification "Exhibit No. 6."

(Paper referred to was marked "Respondent's Exhibit No. 6" for identification.)

By Mr. WALSH:

Q. I show you American Tobacco Company's Exhibit No. 6, for identification, and ask you if it is a letter which you received in reply to commission's Exhibit No. 22 to Murphy Brothers, which is dated Camden, New Jersey, and addressed to Mr. J. B. Bevill, American Tobacco Company, 111 Fifth Avenue, New York, and reads as follows:

"DEAR SIR: We are in receipt of your letter of the 19th instant, and contents of same have been carefully noted by the writer, and in reply I am pleased to advise you that we do not recognize any dealers in Philadelphia as sub-jobbers. They are all retailers and are recognized by us as such. Trusting this is the information desired, and thanking you, I am,

"Yours truly,

"JAMES MURPHY."

939 When did you make that investigation in Philadelphia as to the claims of the jobbers for rebates upon the deal of circular 2748?

A. As near as I can recall, I would say it was a period of three weeks after the deal was in effect.

Q. When did you learn relative to the agreement not to recognize sub-jobbers?

A. During that investigation.

Q. Did you know anything about it before that?

A. I knew nothing about it before that; there were rumors of which I had heard, but I knew nothing of it prior to that.

Q. And did you learn at that time relative to the maximum discount of 8 per cent?

A. Yes, sir.

Q. There was read into the record of this proceeding, I think, when you testified before, a telegram from you to George W. Hill, vice president of the American Tobacco Company, which is dated February 28, 1921. At that time, as I recall, you testified that you did not recall the circumstances of what brought about the sending of that telegram; is that true?

A. That was quite right at that time.

Q. The telegram is: "Mr. O'Boyle will be at your office at nine o'clock tomorrow, Tuesday morning, to discuss the question of Philadelphia sub-jobbers." I will ask you if you recall now what that telegram referred to.

A. Since I was on the stand or gave my testimony before I have talked with Mr. George L. Hill regarding that telegram and he has enlightened me and I can refresh my memory on that part and

940 I believe I could tell you the real basis of the telegram.

Q. What is the real basis?

A. Insuring myself of the circular and my investigation, this referred to that investigation, on the matter we just finished speaking of, these jobbers reporting these special deals sold to sub-jobbers; I was leaving for the West at the time and the investigation was completed and O'Boyle had the information that the sub-jobbers had agreed among themselves that they would go to New York and find out why they were not entitled—

Q. (Interposing) Sub-jobbers?

A. As soon as the jobbers advised them they could buy the deal no longer they made up their minds they were going to New York to see why. As a jobber I tell you there was considerable money involved, as far as the jobber was concerned, so he made up his mind he was going over and get it back too. That is, as I recall, the telegram.

Q. What do you know of the result, Mr. Bevell?

A. It resulted in my agreeing to pay the jobbers for all such deals they sold in Philadelphia on their own statement that there were no sub-jobbers but retailers.

By Mr. HOLMES:

Q. I do not know how clear this is on the record, but just to clarify the working of this deal, Mr. Bevell, at the time you made this investigation, am I correct in understanding that certain job-
941 bers in Philadelphia had given a gratis or free goods in the form of Sweet Caporal cigarettes to a type of dealers who had been theretofore known as sub-jobbers?

A. That is correct.

Q. Expecting to be reimbursed by the American Tobacco Company for those free goods?

A. That is correct.

Q. Do I understand correctly that the deal at the time the matter came up was still in effect, and that you had refused to honor some of these claims of the jobbers on account of free goods given to the type of dealers formerly regarded as sub-jobbers?

A. That is correct.

Q. The result was, therefore, that the jobbers had a complaint or a claim or a grievance on account of free goods theretofore given to this type of dealer and they wanted to be reimbursed?

A. That is correct.

Q. Also, that after you had declined to honor these shipments, as I understand, claims of the jobbers, they refused to give the free goods to this group which was formerly known as sub-jobbers, and that they wanted—that is, the sub-jobbers wanted it?

A. That is correct.

Q. Therefore, there was a complaint on both sides?

A. That is correct.

Q. You had, theretofore, that is, before this situation arose, as I understand, understood that there was a certain group of dealers known as sub-jobbers who were not retailers?

A. That is right.

942 Q. You found out, as a result of your investigation, that the jobbers made no distinction between retailers and the group formerly known as sub-jobbers; is that correct?

A. It is.

Mr. SMITH. I object to this. I have not objected to a lot of these leading questions because he went into things which were not in dispute. Now, we are coming into matters which are in dispute and I object to these leading questions insofar as they go to the matters which are in dispute in this proceeding. I object to the form of this question. This witness is an employee of the American Tobacco Company and he is their own witness for this purpose, and I think he should not be led any further as to these facts.

Mr. HOLMES. It is merely a matter of clarification; if I was leading him it was only on a matter that I thought was immaterial so far as the leading question was concerned, and for the benefit of all concerned, and especially the person who has to read the record and decide upon it, to make this matter clear, I am perfectly willing to change the form of the question.

Mr. SMITH. We consider an answer to the question will be quite important.

Examiner MCCORMICK. Please read the question.

943 By Mr. HOLMES:

(The last question as above recorded was thereupon repeated by the reporter.)

Q. What did you find out as the result of the investigation you made when the claims arose?

A. My investigation from every jobber that was under restraint at the time was his statement that they were making no distinction between retailers and sub-jobbers; they were all treated alike.

Q. At the time the jobbers made those written complaints do you know whether many of them had much money involved?

A. Yes; a number of them had considerable involved.

Q. Could you give a rough estimate of the amount of money that some of the larger jobbers had involved by reason of the free goods that they had already given out?

A. A rough estimate would be anywhere from \$500 to \$1,200.

Mr. HOLMES. That is all.

Examiner McCORKLE. We will now take a recess until one-thirty.

(Thereupon, at 12.30 o'clock p. m., a recess was taken until 1.30 o'clock p. m. of the same day at the same place.)

944

AFTER RECESS

The parties met, pursuant to the taking of a recess, at one-thirty p. m.

J. B. BEVILL, having been heretofore duly sworn, was recalled and testified as follows:

Cross-examination by Mr. SMITH:

Q. Mr. Bevill, in 1921, up to October 3rd, Mr. O'Boyle was in the employ of the American Tobacco Company in a part of the section which was your territory. Is that right?

A. That is correct.

Q. You were his superior?

A. Yes, sir.

Q. Were you familiar with the general business policy of the American Tobacco Company during all of 1921?

A. Yes, sir.

Q. Did you undertake to carry out the business policies of the American Tobacco Company in the territory which was under your jurisdiction in 1921?

A. Yes, sir.

Q. That was during a part of the time that the association of Philadelphia jobbers was in existence. Is that correct?

A. That is correct; yes, sir.

Q. My recollection is vague, but I think that the association functioned up to about November 1st, 1921. Is that your recollection?

A. I would say about that time; of course, I would have to say to about that time.

945 Q. You stated in your direct examination that your recollection had been refreshed through a talk with Mr. George W. Hill as to the substance of the telegram sent by you to Mr. Hill on February 28, 1921, a copy of which telegram was read into the record in this case on October 20, 1922, during your examination. You said that your recollection was refreshed as to the nature of the business upon which the Philadelphia jobbers were to call on Mr. Hill on the first day of March, 1921. Do you remember saying that this morning in your direct examination?

A. Yes, sir.

Q. In what other respects has your recollection been refreshed as to this telegram through your conversation with Mr. Hill?

A. It has been very generally; I made it my business when I went back to have an interview with Mr. Hill and also with my own secretary as applying to certain deals in Philadelphia and as to just when I gave up that part of New Jersey and turned it over to my successor, Mr. Riggio; then I went to see Mr. Hill and told him about the testimony I had given, and I asked him for my own personal satisfaction; I said I would like to know if he could recall the contents or why I sent that telegram to him, and he said in a general way he had that fight in mind between these sub-jobbers and the jobbers, and I think, possibly, we discussed it two or three different times; I do not mean at any length.

Q. Pardon the interruption, but your recollection has been
946 refreshed, as you say, regarding the errand of the Philadelphia jobbers to Mr. Hill on March 1st, 1921, and I asked you whether your conversation with Mr. Hill has refreshed your recollection as to anything else connected with the telegram excepting the purpose of the visit of the jobbers?

A. To the best of my knowledge, outside of the last paragraph of the telegram, which I do not believe has any bearing, I do not know of anything else I really sought to find out.

Q. I asked you in Philadelphia for the names of the jobbers on this committee that was to go to see Mr. Hill—

A. I remember.

Q. (Continuing.) And do you remember stating you did not know or did not remember?

A. That is correct.

Q. Has your recollection since been refreshed as to who those men were?

A. No, sir.

Q. Did you, on the occasion when your recollection was refreshed as to the nature of this visit, discuss with Mr. Hill matters of any particular Philadelphia jobbers who came to see Mr. Hill on this occasion?

A. No, sir.

Q. So that your recollection as to the identity of the Philadelphia jobbers who called on Mr. Hill on the first day of March is no better to-day than it was when you testified?

A. No, sir; because there has been no occasion for me to ask Mr. Hill that question.

Q. I asked you, don't you remember on October 20, 1922, where you secured the information that jobbers of Philadelphia were to call on Mr. Hill on March 1st. Do you remember my asking that?

A. I believe I do.

947 Q. And you testified, if I remember correctly, that you did not remember. Has your recollection been in any wise refreshed since your testimony in Philadelphia as to the source of the information upon which you wired Mr. Hill that Philadelphia jobbers would visit him on March 1st?

A. No, sir; I have had no occasion to refresh it on that, Mr. Smith.

Q. Would it be fair to say that the only respect in which your recollection has been refreshed is that regarding the nature only of the business discussed or to be discussed by the Philadelphia jobbers with Mr. Hill on March 1st?

A. Yes; as it applied directly to me, in my work, or bearing on my organization.

Q. But it would be fair to say that you are only able to recall even at this time the nature of the business discussed between Mr. Hill and the Philadelphia jobbers?

A. That would be the only thing.

Q. That is the only thing you now remember?

A. I do not mean to say that is the only thing I now remember; it is the only thing I had occasion to refresh my memory on.

Q. Is there anything else in connection with this telegram which you now remember which you did not remember when you testified on October 20th?

A. Is there some one particular thing or more you would like to know?

Q. Yes.

A. Will you please ask me the question.

Q. You have testified that your recollection has been refreshed as to the nature of the business discussed between Mr. Hill and
948 the Philadelphia jobbers on March 1st, and I understood you to say just now that there were probably some other things in connection with the telegram about which your recollection has been refreshed. I am now trying to find out what are the other things concerning which your recollection has been refreshed, other than the nature of the discussions between the jobbers and Mr. Hill?

A. I would not know what to say in answer to your question.

Q. Do you understand the question?

A. I think I do; the telegram contained—

Q. I will show you the telegram, Mr. Beville, if you think it will help you in explaining your answer. I am trying to find out from you, and I think you understand me, the things regarding that telegram upon which your recollection has been refreshed other than the nature of the business discussed by Mr. Hill and the Philadelphia jobbers [handing telegram to the witness].

A. I would not know what to say any further. I would not know how to say it to you any more than it was a sort of a general discussion that took place, and when I asked him, more personally than otherwise, if he could enlighten me why I sent that telegram and he agreed as to about what the telegram could have meant, but of course, the latter part of the telegram I do not believe you are interested in at all; that is a matter—the people at that time were working on the red, white, and blue, but as to whether or not there was a meeting in New York, that I cannot tell you.

949 Q. Is that because he, himself, did not remember—Mr. Hill did not remember?

A. Yes, sir.

Q. Do you mean to say, Mr. Bevill, that you are not certain at this time as to what was the nature of the business of the Philadelphia jobbers in calling on Mr. Hill?

A. I would not like to say I was not certain, but to the best of my knowledge that is what they went there for.

Q. And you say that because of the fact that Circular No. 2748 was issued in January and because also of the fact that you remember some difficulty in Philadelphia regarding the extent to which the jobbers were allowed to go?

A. Yes, sir; it caused quite a corruption there.

Q. But you do not remember, even yet, where you got the information upon which you based this telegram or that part of it which notifies Mr. Hill that on the following day the Philadelphia jobbers would call upon him?

A. I would say that information come pretty generally during the investigation which Mr. O'Boyle and myself had been making on these reports contrary to our circular.

Q. This telegram which reads, "I will thank you to see him," meaning Mr. O'Boyle, "as early as possible, as a committee appointed by the Philadelphia jobbers will be there to see you later in the morning"—you do not yet remember, as I take it, from whom you got the information that a committee of Philadelphia jobbers was going to New York to see Mr. Hill on the following day?

950 A. I think I would be safe in saying every jobber in Philadelphia told me.

Q. Can you tell us the names of the Philadelphia jobbers according to the information you got from the Philadelphia jobbing trade, of those who constituted this committee that you wired Mr. Hill was to call upon him?

A. No, sir; I do not think I could give you the names of those today.

Q. You merely heard there was a committee without knowing who it was?

A. That is correct; that was obtained from general conversations held with practically each one of them by either Mr. O'Boyle or myself.

Q. There has been a number of questions asked you regarding this free deal circular No. 2748 and other free deals. Let me sum up my idea of a free deal in my own language and see if it coincides with what a free deal means. As I understand the deal, for a certain definite period of time mentioned in the circular the American Tobacco Company will offer or will suggest to its jobber customers that with sales they make on certain articles to the retailers the jobber customers may throw in as free goods to their retail customers a certain number of items, and that upon a showing by the jobber customer to the American Tobacco Company that the jobber customer has extended these free deals to his retail trade he, the jobber customer, is paid by the American Tobacco Company for these free goods

which the jobber customer or the American Tobacco Company gives to his retail customer. Is that a correct statement?

951 A. That is one style of a deal, except when you stipulate a specified time.

Q. Most of them are limited to a definite specified time?

A. We have a specified time, we say for a limited time.

Q. I suppose there has never been a free deal that has been of permanent duration.

A. We have one, 2727, that has been in almost two years.

Q. That is an exception?

A. Yes; it was our original idea to allow it to run indefinitely.

Q. Have I summed up the definition of a free deal as far as is applied to 2748?

A. Yes, sir.

Q. Now, you stated on your direct examination, as I understood you, that if the free deal were allowed to the sub-jobber, he would be getting his goods cheaper than the jobber?

A. That is correct.

Q. That would be true, I take it, if the sub-jobber bought from the jobber at a discount from this price equal to the discount given by the American Tobacco Company to the jobber?

A. There is a slight difference in between.

Q. You made your statement, I take it, upon the assumption that the discount allowed by the jobber to the sub-jobber would be about equal to the discount allowed by the American Tobacco Company to the jobber?

A. About.

Q. And that would, of course, enable the sub-jobber to get his goods cheaper?

A. Yes, sir.

Q. With the gratis, to get his goods cheaper than the jobber
952 himself would get them from the American Tobacco Company?

A. Yes; and naturally defeat the purpose of our deal.

Q. On the other hand, assuming that the discount from list price allowed by the jobber to the sub-jobber would be much less than the discount allowed by the manufacturer to the jobber, I do not suppose that the sub-jobber, in the event of a free deal, would be getting his goods cheaper than the jobber, would he?

A. Not unless it was a deal that allowed more gratis than that particular one.

Q. For instance, with the jobber buying at list price less 8 per cent and an additional two, it would have to be a free deal of very extraordinary size to enable the sub-jobber to buy at a price more than the jobber, if the sub-jobber was sold by the jobber at, we will say, list less five per cent. It would have to be a tremendous free deal?

A. Yes, sir; anything to make the difference between the gratis of five and the five allowed by the jobber.

Q. This letter, which is known as the commission's Exhibit No. 22 in this case, dated March 19, 1921, to Murphy Brothers by you, was not sent, I take it, to all of the Philadelphia jobbers in connection with your circular No. 2748, was it?

A. Not all of them, to each who followed that paragraph.

Q. How many of those who followed that provision of the circular, or who were reported to have followed that provision of the circular, did you send a letter similar to this Exhibit No. 22?

A. How many, did you say?

953 Q. I asked how many and I was about to ask you who they were?

A. I would say there were approximately fifteen, and, I think, I could possibly mention who they were.

Q. Let us have them.

A. Murphy Brothers, of Camden; A. B. Cunningham, Charles A. Krull, Peter F. Murphy, E. Cohen & Sons, M. Blumenthal, H. E. Narrigan, Victor Fermani, Frenz Brothers, F. Kuhn Brothers; I do not believe I can say anything further.

Q. Do I understand you mean to testify, Mr. Beville, that you sent a letter exactly similar in substance to Exhibit No. 22 to all of these Philadelphia firms you have mentioned?

A. That would be to the best of my recollection, to those firms, to each one I wrote; they got that letter, as you have it in your hand.

Q. You stated in this letter, Exhibit No. 22, as follows: "I understand that according to your association agreement there are no recognized sub-jobbers in the city of Philadelphia and I further understand that you treated all so-called sub-jobbers on exactly the same basis as you did the retail trade, considering them only in the sense of retail merchants and sold according to your agreed price at list less eight per cent."

Where did you acquire the understanding that, according to the association agreement, in which Murphy Brothers participated, there were no recognized sub-jobbers in the city of Philadelphia?

A. I learned that from every individual that I called on who 954 had violated that paragraph in the circular where we did not allow it to apply to the sub-jobber.

Q. Did you know prior to the issuance of this circular that according to the association agreement of the Philadelphia tobacco jobbers they did not recognize sub-jobbers?

A. No, sir; I did not.

Q. You stated in this letter "I further understand that you consider all so-called sub-jobbers on exactly the same basis as you did the retail trade, considering them only in the sense of a retail merchant and sold according to your agreed price at list less eight per cent." As to this part of the letter in which you state that you understood that Murphy Brothers treated all so-called sub-jobbers on exactly the same basis as they did retail trade, where did you acquire that understanding?

A. From them.

Q. From Murphy Brothers?

A. Yes, sir.

Q. And you use this expression in this letter "And that you sold according to your agreed price." By "agreed price," do you mean the association's agreed price?

A. I was endeavoring to quote in that letter just as much of their conversation as I could possibly get into it to make them reply to me that they had sold these sub-jobbers as retailers and at the price they sold them, and not as sub-jobbers.

Q. I did not ask that. I asked you whether in using this phrase "sold according to your agreed price" you meant the price agreed upon by the association?

A. Well, yes; less eight per cent.

955 Q. That was the price that had been agreed upon by the association in effect March, 1921; that is correct, isn't it?

A. Yes, sir.

Q. And that is what you meant by that expression?

A. Exactly, sir.

Q. When did you first get the information that the jobbers of Philadelphia had agreed upon a price to the retail trade of list less 8 per cent?

A. It would be awfully hard to tell you.

Q. How long would you say prior to your writing this letter known as Exhibit No. 22?

A. As far as their maximum discount was concerned, I suppose I was familiar with it after it was in effect a couple of weeks; it was brought to me by my own men.

Q. You could not escape finding it out?

A. It would be impossible; they would want to know in every retail store, and it was to prevent our men talking about that and not attending to their own business.

Q. In answering a question asked by either Mr. Walsh or Mr. Holmes, you stated in explanation of this letter, Exhibit No. 22, that there were a group of sub-jobbers who were not retailers; do you remember that?

A. A group of sub-jobbers who were not retailers?

Q. Yes.

A. I should not have made such a remark, because I do not believe such a thing exists.

Q. As a matter of fact, a sub-jobber usually conducts the retail branch of the tobacco business?

A. That is about right.

Q. That, of course, is true in Philadelphia, and was true in 1921?

A. Yes, sir.

956 Q. You spoke also on your direct examination of the fact that your jobber customers on these free deals would have certain sums of money involved, running from \$700 to \$1,200. I suppose that that money involved represents the reimbursement that they expected from the American Tobacco Company on the goods

which they had taken out of their own stocks and given to their retail customers on these deals; is that what you mean?

A. That is correct; you know, they all report on a form; take Charles Krull; he reported once a month, or every three weeks.

Q. That is what you meant when you said the jobber had money involved in these deals?

A. Yes; because he had taken his own goods and given that for the gratis.

Q. You stated on your direct examination that the purpose, or one of the purposes, of this letter, Exhibit No. 22, to Murphy Brothers, was to see to it that the benefit of this deal went only to the retail trade; do you remember stating that?

A. Yes, sir.

Q. Was there any other purpose you had in mind in writing this letter?

A. No other purpose, other than to protect the amount of money that the company has involved and allowing that to get into those hands and defeat that purpose.

Q. Why, then, if the purpose you testified was the only purpose you had, were you concerned with any agreement that the Philadelphia jobbers had to sell at any specified price?

A. I was not interested; I was trying to quote as much of their conversation to me—I wanted them on record that they were selling sub-jobbers as retailers and treating them that way and selling at the same price.

Q. Why were you interested in any agreed price?

A. I was not interested; I was merely quoting it.

Q. "If my understanding of this matter is correct and you will advise me that these so-called sub-jobbers were sold as retail merchants, on receipt of your advice I will be very glad to issue proper instructions to see that you are reimbursed"—

A. (Interposing). Doesn't that—

Q. You state, as I read this letter, certain understandings that you had, and then you conclude your letter by requesting Murphy Brothers to advise you whether you understand them correctly, and if they are doing as you suggest in the statement of your understanding they will be reimbursed. Now, answering the question with another question, doesn't that show that you had, in writing this letter, another purpose besides the one that you testified to?

A. Not to me, sir.

Q. Not to you?

A. No, sir; I had but one purpose.

Q. And your purpose was to see that the deal went only to the retail trade?

A. Yes, sir; and to get them to go on record that every one of the sub-jobbers sold was sold as a retailer.

Q. Did you know when you wrote this letter on March 19, 1921, that the sub-jobbers of Philadelphia had made with, or had you

958 heard from any source that the sub-jobbers of Philadelphia had organized into a kind of an organization and had tried to get from the Philadelphia tobacco jobbers a better price than those jobbers were giving to the retail trade?

A. No, sir.

Q. Had you heard that these sub-jobbers, or a committee of them, or a number of them, had written to the American Tobacco Company or to any of its officers—

A. No, sir.

Q. (Continuing). Requesting better treatment for the Philadelphia jobbers than they had been receiving?

A. No, sir.

Q. Had you, yourself, ever discussed with any Philadelphia sub-jobber in the early part of 1921 the discounts he was being allowed by the trade in Philadelphia?

A. No, sir; I never visit sub-jobbers; my organization does not, either, by the way.

Q. Assuming, Mr. Bevell, that all of these goods handled by Murphy Brothers on circular 2748 were sold to the retail trade, what interest was it to you what discount Murphy Brothers had given to retail trade or were giving to the retail trade on this deal or any other deal?

A. It was of no interest to me whatever.

Q. Why, then, did you suggest in your letter, Exhibit No. 22, that if Murphy Brothers sold at the agreed price of the association and sold only to retailers, they would be reimbursed on these free deals?

A. I was trying to embody into that letter just as much of their own conversation as I could get in.

659 Q. Is that because you cater in a measure to the wishes of the jobbing trade?

A. We cater very largely.

Q. You wanted to keep them feeling good?

A. Naturally.

Q. That is part of good business, I suppose?

A. It is good business.

Q. Did you find it also to the advantage of the company, or to your advantage, to cooperate with them as far as you could in matters similar to that discussed in this Exhibit No. 22?

A. If I could make plain my real reasons for putting in that list less eight per cent—I am trying to say to you that I wanted to get as much of their own conversation in that letter to protect my company against the violation of that paragraph in the letter where we would not allow them or reimburse them for gratis allowed for goods sold, and the general statement was, "We do not sell to the sub-jobber; we sell to the retailers and at list less eight per cent." I tried to carry that through, to get them to come back with a reply making a statement that they were sold as retailers.

Q. As I gather it, you discussed all of this matter with Murphy Brothers, everything mentioned in this Exhibit No. 22, you had previously gone over with Murphy Brothers?

A. I would say so; yes.

Q. And you had also gone over with them the substance of their reply to you dated March 30, 1921, which Mr. Walsh has read
960 into the record; you also went into all of that with Murphy Brothers prior to the writing of either of these two letters?

A. I do not follow you.

Q. I understand you to say, Mr. Beville, that in writing this letter dated March 19, 1921, to Murphy Brothers, known in this case as Exhibit No. 22, you tried to embody the language that had been used by Murphy Brothers in discussing circular No. 2748 with them?

A. Yes, sir.

Q. That is correct?

A. That is correct.

Q. I assume, also, that when you did discuss the substance of this letter, Exhibit No. 22, with Murphy Brothers, before you wrote your letter, they had told you that they did not recognize any dealers in Philadelphia as sub-jobbers; that they were all retailers and were recognized by Murphy Brothers as such?

A. Yes, and were sold as such; that is the statement they made to me, and then I wrote them to get them on record.

Q. How long had Murphy Brothers been your customers prior to 1921?

A. They were not customers continuously; they were and they were not, from time to time; they went off our list a great many times.

Q. How many times in 1920 were they off the list?

A. I could not tell you.

Q. They were not off in 1920?

A. I could not say.

Q. You know they were in 1921; you know they were off your list in 1921?

A. I think they were at a time.

Q. You investigated the discounts given by Murphy Brothers and found out that they were giving better than seven per cent?

961 A. I would have to get my own records to show what time I gave up that part of New Jersey; it was taken from me and given a man by the name of Riggio, and it was either in the very last of April, or sometime in May Mr. Riggio took Jersey, and so when you speak of the year, I could not answer you. If you say in the early part of the year—

Q. I gather, inasmuch as you wrote this letter on March 19, 1921, Murphy Brothers came under your jurisdiction?

A. That is correct, at that time.

Q. Do you remember Murphy Brothers being cut off of the direct list of the American Tobacco Company in the fall of 1921?

A. No, sir; I do not recall just the time; I have seen the work sheet very frequently with the name being discontinued.

Q. Do you remember in 1921 you made an investigation, or had Mr. O'Boyle make an investigation, of the discounts being allowed by Murphy Brothers?

A. The only way I recall that, Mr. Smith, would be through the testimony of Mr. O'Boyle himself that he gave in Philadelphia.

Q. Don't you remember writing to Mr. O'Boyle on October 27, 1921, telling him that you had been advised that Murphy Brothers were selling at 10 per cent less discount, naming the Philadelphia Wholesale Drug Co., the Post Cigar Company—

A. No, sir; I do not remember.

Q. Do you remember discussing with Mr. P. S. Hill the sales
962 by Murphy Brothers to the Philadelphia Wholesale Drug Company?

A. Not with Mr. P. S. Hill.

Q. What explanation did you give, if you gave any, regarding your interest in Murphy Brothers, as shown in your letter dated March 19, 1921, in that they were selling at agreed price at list less eight per cent; what was your interest in the rate of discount they were allowing?

A. I was not interested at all; that part of my letter I am trying to make plain to you is their conversation.

Q. Your explanation, as I take it, is that you embodied in this letter to them the language and statements they made in their discussions with you previous to your writing them this letter?

A. That is correct.

Q. You admit, I take it, however, that a different construction may be placed upon this letter?

A. Take out the middle paragraph and the letter would accomplish my purpose.

Q. With the middle paragraph in the letter the letter can be construed to mean something different than what you state it would mean?

A. That is true, judging from the time it has taken me to make plain to you the absolute facts.

Q. Isn't it a fact that you wanted to signify in this middle paragraph, and that you did signify, that as sales manager of the American Tobacco Company you were interested, by way of assisting the jobbers who were members of this Philadelphia association?

A. In no way at all.

963 Q. Wasn't it quite your habit in your correspondence in 1921 to assist as far as you were able in behalf of the American Tobacco Company organizations of tobacco jobbers throughout Pennsylvania?

A. I do not think that—

Mr. WALSH. Wait a minute; let him ask the question; assist, I do not think is the question in full; what do you mean, "assist associations"? What does he mean? I object to it because it is not

specific; I have not any objection to the general tenor of the question.

By Mr. SMITH:

Q. I will modify this question. The sense of the question had in contemplation the second paragraph of the letter, but so there can be no mistake about it, Mr. Bevill, I will ask you this, whether, as a matter of fact you did not assist associations of tobacco jobbers throughout Pennsylvania in their agreements to get certain agreed discounts or prices for American Tobacco Company's product, and isn't that exactly what you meant to convey to Murphy Brothers in the second paragraph of this letter, Exhibit No. 22, that you were cooperating with this association?

A. I never did assist or cooperate with any jobbing association anywhere or under any circumstances, neither by correspondence nor by word of mouth.

964 Q. And as I take it, from your testimony, you did not intend to convey to Murphy Brothers the impression that the American Tobacco Company was interested in the matter or would cooperate in the movement of the Philadelphia and Camden jobbers by which they were not recognizing sub-jobbers and by which they were allowing a maximum discount of 8 per cent?

A. It would not have made any difference whether it was 2 or 20 per cent; I was trying to get them on record that they sold as retail merchants and not as sub-jobbers.

Q. And you used, as you have iterated and reiterated the phrase "at agreed price of list less 8 per cent," and that if your understanding of the matter is correct Murphy Brothers will be reimbursed, and in spite of that you say that you were not interested in the discount of Murphy Brothers?

A. I still insist that is so.

Q. And you say you did not assist or cooperate with any association of tobacco jobbers so that they might get prices that were satisfactory to them?

A. No, sir; in no way, shape, or form.

Q. You are positive of that?

A. Yes, sir.

Q. While I am at it, will you be good enough to produce upon call copies of letters sent by you on or about March 19, 1921, to A. B. Cunningham & Company and these other jobbers you have named in your testimony, which letters are similar in substance to this Exhibit No. 22?

965 Mr. WALSH. The witness has stated that he had sent the other letters, and we are not able to locate those others; we only know from his recollection of it.

Mr. SMITH. Mr. Examiner, we think it is quite important as to whether or not this same letter was sent to people other than Murphy Brothers. The witness has said it was. If it was, those letters are probably available, and that is why we called for them.

By Mr. SMITH:

Q. You stated here this afternoon, as I understood you, that you were not interested in the prices at which jobbers resold their products, and that you never assisted any association of jobbers; do you remember testifying about that?

A. Yes.

Q. Do you know E. A. Stroud of Wilkesbarre, Pennsylvania?

A. Yes, sir.

Q. Who is he?

A. He is the proprietor of the Star Tobacco Company.

Q. Do you know T. E. Samuels of Hazelton, Pennsylvania?

A. No, sir.

Q. Was Wilkesbarre, Pennsylvania, in your territory in June, 1921?

A. Yes, sir.

Q. Did Mr. O'Boyle have that territory also under your direction?

A. Yes, sir.

Q. Was Hazelton under your direction in June, 1921?

A. Yes, sir.

Q. Mr. O'Boyle was under your direction in that city?

A. That is correct.

966 Q. Did you, in 1921, cause any investigation to be made of the discounts being made by T. E. Samuels of Hazelton, Pennsylvania?

A. No, sir; I do not remember the account; are you sure those are right?

Q. I am reading from a letter and I take it that it is correct.

A. I have been in the state for 18 years, and I do not believe I ever heard the name before.

Q. Do you know Mr. Stroud quite well?

A. I have known him for a great many years; yes, sir.

Q. Do you have with you any correspondence between you and Mr. Stroud?

A. At the present time?

Q. Yes.

A. No, sir.

Q. I will ask you whether you did or did not, as a matter of fact, write on June 27, 1921, to Mr. E. A. Stroud of the Star Tobacco Company, Wilkesbarre, Pennsylvania and say "I have very carefully read the last paragraph of your letter and hasten to assure you that while it is our company's desire to support any and every jobber who makes a legitimate profit on a merchandise we are ever ready to lend our assistance personally or otherwise in assisting to accomplish this purpose." Don't you remember that you used that language in a letter to Mr. Stroud in June, 1921?

A. I would not say I did not use that language.

Q. Why do you say that you would not say you did not use that language; is it because it is likely that you did use that language?

967 A. Sure, and it is likely that I used it in connection with an affair that happened in Scranton, just outside of Wilkesbarre.

Q. Do you know W. W. Anstach, of the Reid Tobacco Company, of Milton, Pennsylvania?

A. Yes, sir.

Q. Was he in your territory in 1921?

A. Yes, sir.

Q. Anstach complained to you that the Wirth Cigar Coupon, of Elmira, New York, was selling in the neighborhood of Milton, Pennsylvania, at discounts better than tobacco jobbers, customers of yours, were giving in that territory?

A. I did not say he complained about any price made at Milton.

Q. What price did he complain about?

A. As I remember, he complained about a cigar deal being worked out of Canton, Pennsylvania, which was a branch house of Elmira. I do not know of any price-cutting complaint he made on our merchandise.

Q. It was on merchandise that was being sold in Canton, Pennsylvania?

A. That is my recollection.

Q. You made an investigation of the activities of the Wirth Cigar Company?

A. No, sir; I did not make the investigation.

Q. Did you have one made?

A. I could not tell you whether I did or not; it seems to me there was one made. I think Mr. Lindner, of the Reid Tobacco Company, was the one that made it. It was on a popular brand of cigars, if I remember correctly.

968 Q. Did you have Mr. O'Boyle report to Mr. Anstach the result of the investigation of the Wirth Cigar Company or regarding the Wirth Cigar Company?

A. I can not recall whether O'Boyle made the investigation or not.

Q. I asked whether you had Mr. O'Boyle call on Mr. Anstach and inform him of the result?

A. I could not say.

Q. But you recall Mr. O'Boyle did call on Mr. Anstach in that connection?

A. He called very frequently, but in that connection I could not tell you, sir.

Q. Do you know of the Wirth Cigar Company in Elmira, New York?

A. No, sir.

Q. Do you remember, or don't you remember, that the American Tobacco Company discontinued from its direct list the Wirth Cigar Company, of Canton, Pennsylvania, to be effective as of July 22, 1921, because of the complaint of Mr. Anstach?

A. I do not believe I knew they were on the direct list.

Q. You wrote a letter dated July 28, 1921, to Mr. J. C. Lindner, of the Reid Tobacco Company, Milton, Pennsylvania, regarding the outcome of the investigation concerning the Wirth Cigar Company?

A. I do not know—

Q. Do you know him?

A. Yes, sir; very well.

Q. Do you remember writing him in July of 1921 regarding the cutting off by the American Tobacco Company of the Wirth Cigar Company?

A. No, sir; that letter could have been written by anyone with my signature on it.

Q. I take it that an organization like the American Tobacco Company, even if a letter were written over your signature, it would be under your direction?

A. That is quite right, and yet I could have read the carbon copy.

Q. I show you a carbon copy of a letter dated July 28, 1921, and ask you whether it refreshes your recollection as to whether you did write the letters of which the paper I am showing you is a copy; I show you this copy, Mr. Bevill [handing paper to the witness]?

A. Yes; I think I wrote that letter.

Q. Do you now recall, Mr. Bevill, since reading that letter, that you did cause an investigation to be made of the activities of the Wirth Cigar Company?

A. Yes, sir.

Q. You discussed the activities of the Wirth Cigar Company with Mr. George W. Hill, vice president of the American Tobacco Company, in May, 1921, did you not?

A. That is very difficult for me to recall.

Q. That is, as to the date or the time?

A. As to the date and time, yes.

Mr. WALSH. That is not the question; the question is whether or not you did discuss it with Mr. George W. Hill?

A. I can not recall, Mr. Walsh.

Mr. WALSH. I might say that I desire to interpose an objection to this line of examination because it does not in any way relate to the situation of the Philadelphia jobbers, and it is entirely collateral to anything at issue in this proceeding.

Mr. SMITH. Mr. Examiner, this cross-examination has to do with this letter known as Exhibit No. 22, the meaning of which this witness testified to on his direct examination, and I am trying to show by this form of cross-examination, this line of cross-examination, that this letter known as Exhibit No. 22 has a meaning different from the one which this witness testified he places upon it; I am trying to ask the exact meaning of that letter.

Examiner McCORKLE. Proceed with your examination; I think it is proper.

Mr. SMITH. I offer in evidence, Mr. Examiner, this letter which the witness has identified, dated July 28, 1921, to Mr. J. C. Lindner of the Reid Tobacco Company, Milton, Pennsylvania.

Mr. WALSH. That is objected to as irrelevant and immaterial and entirely collateral to any issue in this proceeding.

Mr. SMITH. I ask to have this marked "Commission's Exhibit No. 1, November 28, 1922."

(The paper above identified was marked "Commission's Exhibit No. 1, November 28, 1922.")

By Mr. SMITH:

Q. Mr. Bevill, commission's Exhibit No. 1 as of to-day is the copy of the letter which you say you remember having written Mr. Lindner, is it?

A. Yes, sir.

Q. Did you know that there was an association of jobbers known as the Keystone Association in your territory; did you know of an association known as the Keystone Tobacco Merchants' Association?

A. The name is very familiar.

Q. There was an association of that style in Pennsylvania in 1921, was there not?

A. I thought it was called the Central, wasn't it?

Q. I understand there was also another one called the Central; don't you remember the Keystone?

A. The name is awfully familiar, but I do not believe I could tell you where it was.

Q. Did you ever attend any meetings of any of these associations?

A. Never.

Q. Did you attend a meeting at Williamsport on August 10, 1921, of the Keystone Association?

A. Never, sir.

Q. Mr. Lindner, of the Reid Tobacco Company, to whom you wrote the letter dated July 28, 1921, commission's Exhibit No. 1 as of to-day, was the secretary and treasurer of the association, wasn't he?

A. I do not know, Mr. Smith.

Q. Do you remember the reinstatement of the Scranton Company on the direct list of the American Tobacco Company?

A. Very well.

Q. In July, 1921?

A. Very well.

Q. You wrote a letter to Mr. Lindner telling him that the Scranton Tobacco Company was reinstated on the direct list of the American Tobacco Company effective July 18, 1921, didn't you; do you remember receiving a reply from Mr. Lindner to your letter of July 28, known as commission's Exhibit No. 1, as of to-day, in this case?

A. Does that refer to the Wirth Cigar Company?

Q. Yes.

A. No; I do not remember any reply.

Q. I show you copy of a letter dated August 4, 1921, addressed to you, and ask whether you received the letter of which that is a copy [handing paper to the witness]?

A. There is not any doubt that I saw it before.

Q. You received the letter, did you not?

A. There is not any doubt of it.

Mr. WALSH. Let me look at it.

Mr. SMITH. I offer this letter in evidence.

Mr. WALSH. That is objected to, if the court please.

Mr. SMITH. I ask it be marked "Commission's Exhibit No. 2" as of to-day.

Mr. WALSH. It is what some fellow writes in to the American Tobacco Company, or to Mr. Bevill, and it has nothing to do with anything in the way of policy of the American Tobacco Company. I make this in seriousness. I have gone a long way with counsel in allowing them to offer incompetent testimony, but here is a letter that there is no question as to its incompetency, what some
973 man who is the customer of the American Tobacco Company, who is the respondent in this case, and the man is not in Philadelphia but somewhere in the State of Pennsylvania and he writes in to the American Tobacco Company.

Mr. SMITH. Mr. Examiner, if Mr. Walsh has concluded, let me suggest why it is competent. The cross-examination of this witness has gone to the proposition as to what he meant when he wrote Exhibit No. 22 and this letter, which is just offered, I assume is a letter written by Mr. Lindner to Mr. Bevill—Mr. Lindner, however, was the secretary-treasurer of the Keystone Tobacco Jobbers' Association, and I am going to show by this witness before I conclude with him that he and the American Tobacco Company made it a policy throughout the entire State of Pennsylvania to co-operate with tobacco jobbers' associations, because I am going to show that after this Wirth Company joined the Keystone Association and joined another association and the American Tobacco Company was notified the American Tobacco Company reinstated the Wirth Company on its direct list of customers.

Mr. WALSH. Let him say anything about the policy of the American Tobacco Company, but I submit it is unfair and it is incompetent and irrelevant and immaterial to put into this record
974 what some irresponsible person writes in to the American Tobacco Company and attempt to charge the American Tobacco Company with what he may, and there is an established policy concerning what some stranger may say relative to the business of an industry.

Mr. SMITH. The writer of this letter is not irresponsible.

Mr. WALSH. He is not responsible to the American Tobacco Company.

Mr. SMITH. He seems to be, from that correspondence.

[Argument follows.]

By Mr. SMITH:

Q. Mr. Bevill, this letter known as commission's Exhibit No. 2, as of to-day, is a letter which I understand you say you did receive from Mr. Lindner; is that correct?

A. Yes, sir.

Q. I show you a letters dated July 28, 1921, addressed to Mr. Lindner by you and ask you if this is a copy of the letter sent by you to Mr. Lindner on that date [handing paper to witness]?

A. Yes, sir.

Q. Is this letter to Mr. Lindner dated July 28, 1921, one of the letters which is referred to in this letter to him known as commission's Exhibit No. 2 of to-day?

Mr. WALSH. The letter speaks for itself as to that.

The EXAMINER. Go ahead.

The WITNESS. Yes, sir; in part.

975

By Mr. SMITH:

Q. In other words, in Exhibit No. 2 there are two letters referred to, one letter regarding Scranton and another letter regarding Wirth?

A. There are so many referred to—

Q. I am speaking only of letters; in the letter, referring to commission's No. 2 of today, the opening paragraph, "In reply to yours of July 28th concerning Scranton and Wirth," and as a matter of fact the letter dated July 28th to Mr. Lindner regarding the Scranton Tobacco Company is one of the letters which is mentioned in the opening paragraph?

A. I would say so.

Mr. SMITH. I offer this letter in evidence and ask that it be marked "Commission's Exhibit No. 3," as of to-day.

Mr. WALSH. I object.

Examiner McCORKLE. I think it is competent.

(The paper so identified was marked "Commission's Exhibit No. 3, November 28, 1922.")

By Mr. SMITH:

Q. Mr. Beville, in the opening paragraph of the letter known as commission's Exhibit No. 2 as of today there are two letters of July 28th referred to. Aren't those two letters commission's Exhibit No.

1 as of today regarding the Wirth Cigar Company and commission's Exhibit No. 3 as of today regarding the Scranton Tobacco Company?

A. Correct, sir.

Q. Did you notice in this commission's Exhibit No. 2 as of today mention of the Keystone Association?

A. I notice it.

Q. Does that refresh your recollection now as to whether there was an association of that name?

A. I believe there was, but I do not know which one it was.

Q. Do you remember now that Mr. Lindner who wrote you this letter known at commission's Exhibit No. 2 was the secretary treasurer of any tobacco jobbers' association?

A. No, sir.

Q. I understand that the policy of your company in Philadelphia is the same as it is generally throughout the entire territory?

A. The policy of the American Tobacco Company is the same in the entire section; yes, sir.

Q. Do you remember receiving a complaint from Mr. Lindner of the Reid Tobacco Company regarding Ely Bull, of Nescopok, Pennsylvania?

A. I do not recall it.

Q. I show you a letter dated August 26, 1921, addressed by you to Mr. Lindner and ask whether that is a copy of a letter which you wrote on that date to Mr. Lindner [handing paper to witness]?

A. It is very possible; yes, sir.

Q. As a matter of fact you did write the letter of which that is a copy, did you not, Mr. Bevell?

A. It is very possible I did.

Mr. SMITH. I offer this letter and ask that it be marked—

977 Mr. WALSH. Objected to as incompetent, immaterial, and irrelevant.

Examiner McCORKLE. It is admitted as proving the policy of the company.

Mr. SMITH. In Philadelphia; I ask that it be marked "Commission's Exhibit No. 4," as of today.

(The paper above identified was marked "Commission's Exhibit No. 4, November 28, 1922.")

By Mr. SMITH:

Q. The paper, which is a copy of letter which you say you did write on August 26, 1921, is the one which has been marked "Commission's Exhibit No. 4," of today, is it?

A. Yes, sir.

Q. What is this letter, that is, commission's Exhibit No. 4?

Mr. WALSH. That is objected to because it speaks for itself.

Mr. SMITH. An answer to the question is waived, Mr. Examiner.

The WITNESS. Everyone has a meaning—

Mr. SMITH. I withdrew or waived an answer to the question.

By Mr. SMITH:

Q. How far, approximately, is Milton, Pennsylvania, from Scranton, Pennsylvania?

A. Seventy-five miles, approximately.

Q. Do you remember getting on or about June 1st, an invitation to attend the Keystone Tobacco Merchant's Association meeting at the Hotel Casey, June 8, 1921, at Scranton, Pennsylvania?

A. I do not recall the invitation; no, sir.

Q. Do you remember that you sent a wire on June 1st, 1921, to Mr. Lindner regarding an invitation you had received to attend a meeting of the Keystone Tobacco Merchants' Association?

A. I do not recall the telegram; no, sir.

Q. I show you a paper which purports to be a copy of a telegram sent by you to Mr. Lindner and ask you whether you did send a telegram of which the paper I hand you is a copy [handing paper to witness]?

A. The letter I am entirely familiar with and could explain. While it is possible that one could be sent—this was written June 1st, telegraphed June 1st, and I do not seem to follow it through at all.

Q. You do not remember receiving a letter on or about June 1st from Mr. Lindner inviting you to attend a meeting of the special cigarette committee of the Keystone Tobacco Merchant's Association?

A. No; not of the association; that was on a meeting to be called to reinstate the Scranton Tobacco Company for what we took them from the direct list for. They were not—

Q. I merely—

Mr. WALSH. Let him answer the question; when he thinks there may be some answer which might not be in favor of the commission you stop him.

979

By Mr. SMITH:

Q. I merely asked whether he remembers getting an invitation to attend a meeting of the special cigarette committee on June 8th at the Hotel Casey. Did you receive an invitation to attend a meeting of the special cigarette committee to be held at the Hotel Casey, Scranton, Pennsylvania, on June 8th, 1921?

A. You say an invitation? I do not remember receiving any.

Q. Did you receive a request from Mr. Lindner?

A. I suppose altogether I have been requested by Clarence Lindner to attend poker meetings and card meetings and parties of all kinds and characters with him and his whole outfit a good many times. That special might apply 100 per cent personally.

Q. Do you remember receiving a letter from Mr. Lindner dated July 23, 1921, a copy of which I show you [handing paper to witness]?

A. No, sir; Mr. Smith, I do not recall any part of this letter; I have not any idea of the names mentioned.

Q. Do you remember writing a letter to Mr. Lindner July 25, 1921 in reply to a letter he wrote you on July 22, 1921?

A. No, sir; I could not recall the contents of it; I could not tell you what it was. If I may, Mr. Smith, this secretary-treasurer you spoke of, Mr. Lindner, is secretary-treasurer of the Reid Tobacco Company.

Q. He also was secretary in 1921 of the Keystone Tobacco Association?

980 A. I happened to notice below his signature he is marked "secretary-treasurer," and that is his position with the Tobacco Company.

Q. In all the letters which I have shown you which are signed by Mr. Lindner as secretary and treasurer, those are all letters regarding the association are they not?

A. No; I would not say so. I think all those personal letters, marked "personal" to me, have the same thing.

Q. They are all in connection with discounts in connection with complaints to you regarding discounts allowed by certain tobacco people?

A. That is about the only kind of letters I got from anybody.

Q. Mr. Bevill, did you testify here this afternoon during my cross-examination of you regarding the discontinuance of the account of the Wirth Company?

A. Did I discuss it?

Q. Did you testify regarding it; did you state that it was discontinued?

A. I do not believe I stated it. To the best of my recollection it was not discontinued, and to be perfectly frank with you I do not recall.

Q. I think you did testify about that; you changed your answer and said it was discontinued.

A. It was such a brief period that they went into business and then went out automatically themselves that I was not familiar with the circumstances at all. It was a very short time.

Mr. SMITH. If you will agree that these two letters, one written by Lindner to O'Boyle and one by O'Boyle to Lindner, 981 if you will admit the genuineness of those letters—

Mr. WALSH. Let us look at them. I have no objection because they are copies, but they have no materiality and are entirely collateral here, as they go into a Central Pennsylvania case.

Mr. SMITH. Not except that it bears on some policy in Philadelphia.

Mr. WALSH. That has nothing to indicate it has anything in reference to the price maintenance or conspiracy to maintain a price, neither the letter which Lindner writes nor the other letter. This is absurd, to introduce all that. For instance in a murder case could you introduce a letter from an outside party saying, "We are delighted that you murdered that fellow and if you get out we will help you murder somebody else."

Examiner McCORKLE. But, if you wrote him a letter and said you were glad he was well and did not contradict the statement, how about that?

Mr. WALSH. There is nothing in these at all.

Mr. SMITH. I do not know that I am called upon to state again why this is proper.

Examiner McCORKLE. We have gone into it.

Mr. SMITH. I offer in evidence copy of a letter sent by Mr. Lindner heretofore referred to during the cross-examination of Mr. Bevill to Mr. T. F. O'Boyle, also mentioned in the 982 cross-examination of Mr. Bevill, on August 12, 1921, and ask that this letter be marked "Commission's Exhibit No. 5" as of to-day.

(The paper above identified was marked "Commission's Exhibit No. 5, November 28, 1922.")

Mr. WALSH. I will object to the introduction of these papers and the receipt in evidence of these papers, because they are irrelevant and immaterial and in no way related to the issues in this matter. They are entirely collateral, and further, no statement made by Lindner, who wrote one of the letters, in any way binds the American Tobacco Company. He is a stranger to this business and to this procedure, and I further object that the letter purporting to be written by T. F. O'Boyle, that there is nothing to indicate there are any admissions or statements within the scope of his authority, and further that there is nothing in the letter in any way relating to any proceeding that is now being heard before the commission.

Examiner McCORKLE. I have not looked at the letters, but if they are letters that import the policy of this company in another part of the State of Pennsylvania about which there is an issue in the Philadelphia case I think they are competent.

983 Mr. WALSH. There is not anything of that kind in the letters to establish any policy one way or the other. Any letter which a stranger writes will never bind the American Tobacco Company.

Examiner McCORKLE. The witness further testified that they had the same policy in every section. I will admit them, and Mr. Walsh has noted an objection.

(The paper so identified was marked "Commission's Exhibit No. 5, November 28, 1922.")

Mr. SMITH. I also offer, Mr. Examiner, copy of a letter dated August 16, 1921, addressed by Mr. T. F. O'Boyle, heretofore referred to in the cross-examination of Mr. Bevill, to Mr. J. C. Lindner, also heretofore referred to in the cross-examination of Mr. Bevill, and ask that this be marked "Commission's Exhibit No. 6."

Mr. WALSH. We object to it as being incompetent, irrelevant, and immaterial and in no way involved in this case, and as an entirely collateral matter.

Examiner McCORKLE. This is a letter of Mr. O'Boyle's?

Mr. WALSH. Yes.

Examiner McCORKLE. I think that is competent.

(The paper above identified was thereupon marked "Commission's Exhibit No. 6, November 28, 1922.")

984 Mr. WALSH. My understanding is now that the court has not yet ruled upon the introduction in evidence of commission's Exhibit No. 2 of November 28, 1922, this letter of J. B. Bevill, sales manager, to a man named Lindner; my understanding is that the court has not yet ruled upon the introduction of the letter.

Examiner McCORKLE. My understanding is they were all admitted.

Mr. WALSH. The court has admitted it?

Examiner McCORKLE. Yes.

Mr. WALSH. I am astonished at that; it seems to me that it is entirely out of order in a judicial procedure; but there must be

some error, and I think the examiner ought to recanvass the situation.

Examiner McCORKLE. From a cursory reading of the letters it looks like they are introduced for the purpose of establishing this policy that obtained, or was alleged to have obtained, in Philadelphia, and of course anything that tends to do that is competent; but I might have said that something in reply to some letter of Mr. Bevill's which was unauthorized, that can not be taken as evidence against the Tobacco Company, but only those things in these letters which tend to establish a policy.

Mr. WALSH. If the examiner please, I think we are entitled to a little more consideration than a cursory examination of 985 the letters, because I submit that it is a matter of so great importance—

Examiner McCORKLE. I mean I looked at them sufficiently to satisfy myself that I thought they were competent.

Redirect examination by Mr. WALSH:

Q. Mr. Bevill, referring to this correspondence which the examiner has admitted in evidence, and particularly with respect to the alleged cutting off of Scranton and Wirth, I will ask you whether or not Wirth, in the conduct of his business, was doing anything that was detrimental to the interests of the American Tobacco Company?

A. Mr. Walsh, while I am not as familiar with that circumstances as I would like to be, my recollection is this, that he had a brand of cigars called "Bold," and he was extremely anxious to market it and he marketed it by giving away free of charge our merchandise, charging sufficient additional price on the Bolds to cover our cigarettes on the Bold cigars, which is a bigger seller, was bigger, against the cost of our cigarettes, and it appeared they did so well that a complaint was entered practically from everybody in the business. I do not understand why I can not recall the circumstances at Canton.

Q. This refers to Scranton?

A. The Wirth Cigar Company is at Elmira; this is why they were on the direct list. That letter refers to 17 or 18 different things, and it is my recollection that after I got the details of that 986 we found out our merchandise was being abused and we just discontinued the account of Wirth. Whether that was at Elmira or Canton I am not prepared to tell you, because I can not recall.

Q. But he had the stores at both places and he was, as a matter of fact, engaging in this practice of which you have told us?

A. Yes.

Q. What were the circumstances concerning Scranton?

A. The Tobacco Company was taken off our direct list for absolute abuse of our product.

Q. In what way?

A. In substituting war goods into cartons of Bull Durham, taking that out and substituting this stuff in there, and I took him off the list and kept him off for five months.

Q. For doing that?

A. Every jobber in that country—and Lindner was the one supplying to him—and very naturally I did not want Lindner to have more merchandise on hand than he had to have when I wanted to ship to Scranton again.

Q. Did you ever attend any meeting of the Keystone Association?

A. I never attended a meeting of any association.

Mr. WALSH. Mr. Examiner, in view of this situation that has been testified to, I ask that the letters be stricken from the record.

(Argument followed.)

Examiner McCORKLE. I will have to let them stay in and you argue that out before the commission.

987

By Mr. WALSH:

Q. Referring again, Mr. Bevill, to the telegram which you sent to George W. Hill about the committee coming to visit him in New York, in which you say that you are having Mr. O'Boyle go there first, and having him talk to him, why was it you wanted Mr. O'Boyle to talk to Mr. Hill before the committee arrived?

A. I wanted Mr. O'Boyle there so he could offer what he had to say regarding our investigation and findings and get out.

Q. You wanted to have Mr. Hill have the facts from your standpoint before the committee got there?

A. Yes, sir; before he got it from those people.

Q. And there was some testimony here relative to jobbers who violated that circular; the circular was violated, as I understand it, and each one of these jobbers reported to whom they had sold under this circular 2748?

A. Yes.

Q. This violation, if there was any violation, was as indicated by their own report?

A. Oh, yes.

Q. There was nobody reporting to you that there was a violation except as shown by their own report?

A. The reports they sent in showed the violations.

Q. Referring to that Philadelphia situation, was there anything in the correspondence with Murphy or the letters that you wrote to other jobbers showing any desire upon the part of yourself or the American Tobacco Company to eliminate sub-jobbers in any way?

A. No, sir; in no way.

Q. Were you interested in the elimination of sub-jobbers?

A. No, sir.

Q. In your testimony during Mr. Smith's examination there was some testimony relative to this reply of Murphy Brothers, which is American Tobacco Company's Exhibit No. 6. Do you mean to infer that you suggested to Murphy Brothers what kind of a letter they should write to you?

A. No, sir; I do not mean to infer any such thing.

Q. Did you ever say anything to Murphy Brothers as to what character of letter should be answered to you?

A. No, sir.

Q. Were you in any way attempting to suggest or direct or coerce Murphy Brothers or any other jobber in Philadelphia or anywhere to maintain any particular discount?

A. No, sir.

Q. Or to say to them who should or should not be their sub-jobbers or retail customers?

A. No, sir; I had nothing to do with them whatever.

By Mr. HOLMES:

Q. Mr. Bevill, when you went to the jobbers who had reported giving these free gifts to sub-jobbers, you have testified, I believe, that you wanted some assurance that they were treating sub-jobbers and all customers on the same basis?

A. Yes, sir.

Q. What you wanted was an assurance that they were on the same basis. Now, did it occur to you that if they said, "We are treating them all alike; we are giving them at 8 per cent off," that that would be a little bit more emphatic than if they said, "We are treating them all alike"?

A. Investigation proved that. We go to the retail merchants and find out what the jobbers are selling him, and then we go to the sub-jobber and find out whether they are selling as retailers.

Q. Did you think it might be a little stronger to have them say how much they were getting from everybody?

A. I tried to get as much of their own conversation as possible when I asked for the reply.

Q. And did you think it strengthened their assurance any when they said "We are giving them all such and such a discount," mentioning the discount?

A. Yes, sir.

Q. Did you care what the discount was?

A. No, sir.

Q. As long as it was the same to all their customers?

A. It made no difference to me.

Q. You testified, as I understand, in reference to commission's Exhibit No. 4, letter by you to Lindner, Reid Tobacco Company, Milton, Pennsylvania, reference Ely Bull, Nestopek, Pennsylvania. You do not recall what the matter was regarding the complaint about Ely Bull?

A. No, sir; I do not recall it at all.

Mr. HOLMES. I think that is all.

9900 Recross-examination by Mr. SMITH:

Q. Mr. Bevill, you testified in answer to a question asked by Mr. Walsh that you were never connected with any jobbers' association and you never attended any meetings of any associations. Were

you not a member of the cigarette committee of the Keystone Association?

A. No, sir; I was not.

Q. Were you a member of any jobbers' association in 1921?

A. No, sir; nor at any other time.

Q. State whether or not a committee of the Keystone Association conferred with you in 1921 regarding the business of the American Tobacco Company.

A. No, sir.

Q. Did you ever meet a committee of any tobacco jobbers' association at any time or at any place in 1921?

A. No, sir.

Q. Did you have any discussion with any sub-committee or any jobbers' association in 1921 regarding the sale of American Tobacco Company's products?

A. No, sir.

Q. Did you have a meeting with one or more members of a committee of any tobacco jobbers' association in the year 1921?

A. Will you please repeat the question?

(The last question as above recorded was thereupon repeated by the reporter.)

A. No.

Q. Were you ever present at any meeting of any committee of any tobacco jobbers' association?

A. No, sir.

Q. Were you ever present at any place with any members of a committee of any tobacco jobbers' association in 1921?

A. The question is such—I have been to theatres with individuals who are members of the association; I have played cards with them, but I swear I do not know just how to answer it. I do not want to say anything that is not true.

Q. I know, and I am trying to get at this, and I do not think we will have any difficulty in understanding one another. I am trying to find out whether you discussed with two or more members of any committee of any association in the year 1921 the tobacco business?

A. To the best of my knowledge, no, sir; with no one. I have been to the theatres; it is an association extending over a period of 18 years.

Q. I am talking about 1921.

A. In 1921; it is no different at the present minute. It is a matter of love and friendship.

Q. You do not mean to say that you have not met more than one at the same time?

A. I suppose I have.

Q. You have been in the company of two, three, or four?

A. Yes, or maybe a dozen. I remember an instance where I met these men on the train and we played cards all the way to Buffalo. I did not mean to avoid anything. The question was hard for the moment; I did not know what you wanted.

Colloquy between examiner and counsel

MR. SMITH. That is all.

EXAMINER MCCORKLE. Mr. Walsh, did you state that you rested your case?

1922 MR. WALSH. I rest.

EXAMINER MCCORKLE. The case is closed as to the American Tobacco Company. As to Lorillard—

MR. WALSH. I mean, I rest unless there is something in the testimony of Lorillard that may affect the American Tobacco Company, but, of course, the examiner will grant me the right—

MR. SMITH. I stated that the commission rested as to the American Tobacco Company in New York; the American Tobacco Company has put in its defense and we have no further testimony at all as to the American Tobacco Company.

MR. WALSH. The American Tobacco Company rests except that if in the testimony which may be presented on the part of the Lorillard Company or against it, something is elicited affecting the interests of the American Tobacco Company, even the American Tobacco Company will claim the right to cross-examine witnesses, or to present further testimony in refutation of testimony which it thinks ought to be refuted.

EXAMINER MCCORKLE. The case against the jobbers is rested?

MR. SMITH. We had rested our case in chief.

EXAMINER MCCORKLE. I mean, against the Philadelphia jobbers.

1923 MR. SMITH. We had rested in New York our entire case in chief, the jobbers American Tobacco Company and Lorillard.

EXAMINER MCCORKLE. I am asking what they did.

MR. SMITH. My understanding was that they were not going to introduce any testimony in defense. Whether they have stated that in the record, I do not now remember. Lorillard, my understanding is, intends to introduce testimony in defense of the allegations of the complaint, but I do not think the jobbers intend to offer testimony.

EXAMINER MCCORKLE. That will be heard on the 14th of December.

MR. SMITH. Yes; the Lorillard Company will introduce testimony in defense of the complaint of its proceedings on the 14th of December at 10.30 in the morning in the office of the commission, which time and place have been agreed upon by Mr. Caldwell and myself and the examiner.

EXAMINER MCCORKLE. They can not close the case under the circumstances.

MR. SMITH. I ask an adjournment until December 14, 1922.

EXAMINER MCCORKLE. The case is adjourned until December 14, 1922, at 10.30 o'clock a.m. at this place.

(Thereupon at 4.05 o'clock p. m. an adjournment was taken in the above entitled cause until 10.30 o'clock a. m., December 14, 1922, at the same place.)

BEFORE THE FEDERAL TRADE COMMISSION

FEDERAL TRADE COMMISSION

VS.

WHOLESALE TOBACCO AND CIGAR DEALERS' ASSOCIATION of Philadelphia et al.

Docket No. 886

ROOM 2702, FEDERAL TRADE BUILDING,

Washington, D. C., Thursday, December 14, 1922—10 a. m.

Met pursuant to adjournment.

Before: Mr. George McCorkle, examiner.

Appearances: Mr. Edward L. Smith and Mr. Edwin B. Haas (Washington, D. C.) appearing for the Federal Trade Commission; Mr. Charles Caldwell (233 Broadway, New York City) appearing for the P. Lorillard Company, Inc.; Mr. John Walsh (404 Southern Building, Washington, D. C.) appearing for the American Tobacco Company.

PROCEEDINGS

EXAMINER McCORKLE. This is the time and place to which Docket No. 886, Federal Trade Commission vs. Wholesale Tobacco and Cigar Dealers' Association of Philadelphia and others was adjourned.

MR. CALDWELL. This case was left open because of the illness of Mr. Ball, who was called as a witness in New York, at the time Mr. Hill was called.

MR. SMITH. It may be pertinent to have the record show the closing of the case as to the respondents referred to by Joseph H. Taulane, Esq., who are the respondents signing the joint answer of a number of the jobbers. I wrote to Mr. Taulane:

DECEMBER 7, 1922.

MR. JOSEPH TAULANE,

Stephen Girard Building, Philadelphia, Pa.

Docket No. 886 -

DEAR SIR: The American Tobacco Company, one of the respondents in the above designated proceeding has concluded the offering of testimony in defense of the allegations against it in the complaint therein. On the 14th inst., at 10.30 a. m. at the commission's offices in Washington, P. Lorillard Company will introduce testimony in defense of the allegations against it in the complaint, or in the event it does not desire to offer testimony, will make a statement to that effect on the record of the proceedings.

In the event that you desire to offer testimony on behalf of the respondents whom you represent, I will thank you to offer same at Washington on the 14th inst., at the Lorillard hearing; or if you desire to offer no testimony on behalf of your clients, I will thank you to be in Washington at the hearing so that you may make a statement to that effect on the record of the proceedings, or I will

thank you to address a letter to the commission, or to the trial examiner, to that effect, so that such letter may be made a part of the record in the case.

Very truly yours,

W. H. FULLER,
Chief Counsel

Yesterday the chief counsel of the commission received from Mr. Taulane a letter dated December 12, 1922, which is the reply to the letter I have just read, and I will ask that it be made a part of the record in this case. It is as follows:

997 LAW OFFICES WHITE, WHITE & TAULANE,
1201 STEPHEN GIRARD BUILDING,
Philadelphia, December 12, 1922.

W. H. FULLER, Esq.,
Chief Counsel, Federal Trade Commission,
Washington, D. C.

Federal Trade Commission

vs.

Philadelphia Wholesale Tobacco Dealers Assn.

DEAR SIR: I have your letter of December 7th stating that the next meeting in the above will be at Washington on December 14th, at 10.30 a. m., when the Philadelphia Wholesale Tobacco Dealers Association and the members thereof may offer evidence on their behalf if they so desire, and if they do not so desire, it should be so stated.

On behalf of the Philadelphia Wholesale Tobacco Dealers Association and those members thereof for whom I have entered appearance, I beg to say that we will offer no testimony, and you may make this letter part of the record.

Yours very truly,

JOSEPH H. TAULANE.

998 I ask that this be marked as "Commission's Exhibit No. 50"

(The letter so offered and identified was received in evidence, marked "Commission's Exhibit 50," and is forwarded herewith.)

Mr. SMITH, Mr. Examiner, on the 7th of this month the chief counsel of the commission wrote to James Murphy and John Murphy, both of whom are respondents in this case, requesting them to introduce testimony in their own behalf at this time and place in case they desired to introduce testimony in defense of the allegations in the complaint. The letter to both of these gentlemen asked them to notify the commission or the examiner by letter in the event that they waived the introduction of testimony in their own behalf. I have here the carbon copy of each of the letters, and ask that they be marked respectively "Commission's Exhibit No. 51," and "Commission's Exhibit No. 52."

(The copies so offered and identified were received in evidence, marked "Commission's Exhibit 51" and "Commission's Exhibit 52," and are forwarded herewith.)

Mr. SMITH. The commission is in receipt of a letter dated December 11, 1922, from Murphy Brothers, which is in reply to the letters, commission's Exhibits 51 and 52. This letter reads as follows:

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Murphy Brothers Wholesale Tobacconists
Fine Imported and Domestic Cigars
Delaware Ave. and Market St.,
N. E. Cor. 2nd and Market Streets

CAMDEN, N. J., December 11, 1922.

FEDERAL TRADE COMMISSION,
Washington, D. C.

Docket 886

GENTLEMEN: Replying to your letter of the 7th inst., beg to state that Mr. James Murphy and Mr. John Murphy waive the introduction of testimony in defense of the allegations in the complaint.

Thanking you for your attention to this matter, we are

Very truly yours,

MURPHY BROS.,
JAMES MURPHY.

I ask that this letter be made a part of the record in this case and marked "Commission's Exhibit 53."

(The letter so offered and identified was received in evidence, marked "Commission's Exhibit No. 53," and is forwarded herewith.)

(00) Mr. SMITH. So that there may be no doubt arising from the statements made by me in the record in this case, I will now state, Mr. Examiner, that the commission will introduce no further testimony against the P. Lorillard Company as to the allegations contained in the complaint in this proceeding, and that the case against the Lorillard Company by the commission is rested.

As to the American Tobacco Company the case is rested on both sides and closed.

It might be well to suggest at this time that at the close of the hearing here in the Philadelphia case I will ask an adjournment to Philadelphia to Tuesday, December 19, 1922, at 10 a. m., at Room 218 Federal Building, for the purpose of showing the extent of the business and the organization of four or five of the firms who are joint respondents, and for the purpose further of giving those respondents an opportunity of putting in testimony in their own behalf if they so desire.

Examiner McCORMICK. That date is agreeable to everybody, is it?

Mr. SMITH. I imagine so.

Mr. CALDWELL. I do not think any of us will be there to keep you company, however.

Mr. SMITH. I do not think the tobacco companies will be interested in the hearing, because of the nature of the testimony that will be introduced.

Mr. CALDWELL. Mr. Examiner, on behalf of the Lorillard Company, the case of the commission being closed, I now move to dismiss the complaint on the ground that the cause set up in the complaint has not been proven or established, that no cause of action whatever has been established, as against this company, and I move separately to dismiss the complaint upon each ground stated at the opening of the case.

Examiner McCORKLE. The motion is overruled and referred to the commission for decision.

Mr. CALDWELL. I take an exception on that ground.

Examiner McCORKLE. The hearing of this case, Docket No. 886 is adjourned temporarily, subject to the call of the examiner, and Docket 909, Federal Trade Commission vs. Cincinnati Wholesale Tobacco Dealers' Association and others will be called, and the testimony taken in that case, which later by stipulation may be used in this Docket No. 886.

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BEFORE THE FEDERAL TRADE COMMISSION

FEDERAL TRADE COMMISSION,	} Docket No. 886
VS.	
WHOLESALE TOBACCO AND CIGAR DEALERS' Association of Philadelphia, and others	

ROOM 2702, FEDERAL TRADE COMMISSION,
Washington, D. C., December 15, 1922.

Before: Mr. George McCorkle, examiner.

Appearances: Mr. Edward L. Smith and Mr. Edwin B. Haas (Washington, D. C.) appearing for the Federal Trade Commission; Mr. Charles Caldwell (233 Broadway, New York) appearing for the P. Lorillard Company; Mr. Charles S. Moore (Woodward Building, Washington, D. C.) appearing for Cincinnati and Covington tobacco jobbers, excepting the Janssen Grocery Company.

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PROCEEDINGS

Mr. SMITH. In this case, Mr. Examiner, the commission has no further proof to offer as to the Lorillard Company.

Mr. CALDWELL. Did I understand the case as to the Lorillard Company is closed by the commission?

Mr. SMITH. Yes, sir.

Mr. CALDWELL. That being so, I make the same motion to dismiss the complaint at this time and based upon the same grounds as I made in the opening of the case and on each ground separately.

Examiner McCORKLE. The motion is overruled and referred to the commission for decision.

Mr. CALDWELL. I respectfully take an exception on each ground above stated. Now, Mr. Examiner, I offer a stipulation in this case that the direct testimony of Mr. Ball—and will consent that Mr. Smith offer the cross-examination of Mr. Ball—taken in Docket 909.

that such testimony and the exhibits shall be considered a part of the testimony and exhibits in this case, 886.

Mr. SMITH. I have no objection to the offer made by Mr. Caldwell to the introduction of the direct testimony of Mr. Ball as a part of the record in Docket No. 886. It seems to me that as long as the direct testimony is offered and there is not any objection by me, that the cross-examination also in Docket No. 909 should become a part of the record in Docket No. 886, together with the exhibits produced on the cross-examination of Mr. Ball in Docket No. 909, and I offer, therefore, as substantive proof of the allegations of the complaint in this case the cross-examination of Mr. Ball in Docket No. 909 and the exhibits referred to in that cross-examination. I request that in case there is a conflict between the exhibit numbers of the papers admitted in the direct and cross-examination of Mr. Ball—that is, in respect that they may conflict as to their numbers with numbers in Docket No. 886—the reporter, under the direction of the trial examiner, shall be authorized to and does make the necessary corrections in exhibit numbers.

Examiner McCORKLE. That may be done.

BEFORE THE FEDERAL TRADE COMMISSION

FEDERAL TRADE COMMISSION

VS.

CINCINNATI WHOLESALE TOBACCO DEALERS' Association et al.

Docket No. 909

ROOM 2702, FEDERAL TRADE BUILDING,

Washington, D. C., Thursday, December 14, 1922—10.30 a. m.

Met pursuant to notice.

Before: Mr. George McCorkle, examiner.

Appearances: Mr. Edward L. Smith and Mr. Edwin B. Haas (Washington, D. C.) appearing for the Federal Trade Commission; Mr. Charles Caldwell (233 Broadway, New York) appearing for the P. Lorillard Company; Mr. Charles S. Moore (Woodward Building, Washington, D. C.) appearing for Cincinnati and Covington tobacco jobbers, excepting the Janszen Grocery Company.

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Examiner McCORKLE. We will now proceed with Docket No. 909, Federal Trade Commission vs. Cincinnati Wholesale Tobacco Dealers' Association and others.

DAVID H. BALL was called as a witness and after being first duly sworn, testified as follows:

Direct examination by Mr. CALDWELL:

Q. Mr. Ball, where do you reside?

A. Mount Vernon, New York.

Q. Are you connected with the P. Lorillard Company, one of the respondents in this case?

A. I am.

Q. How long have you been connected with that company, and in what capacities?

A. Since December 1, 1911, as vice president.

Q. In general, what are your duties as vice president?

A. My principal duties—do you want them during 1920 and 1921?

Q. Yes; especially during those years.

A. My principal duties were looking after the selling end of the business of the P. Lorillard Company tobacco lines, both chewing and smoking.

Q. Is the Lorillard Company a manufacturing company?

A. It is.

Q. What different kinds of products does it manufacture?

1007 A. Chewing tobacco in the form of plug, fine plug, and scrap; smoking tobacco in the form of granulated, plug, and cut, long cut and redicut, smoking and fine-cut plug.

Q. Have you mentioned cigarettes?

A. During 1920 and 1921 I was not in charge of the cigarette business.

Q. That is not the question. The question is what different kinds of products does the Lorillard Company manufacture?

A. Cigarettes, little cigars, cigars, and the types of tobacco that I have mentioned.

Q. Is the P. Lorillard Company engaged, and for a number of years last past has been engaged, in the manufacture of tobacco and commonly known as one of the largest tobacco companies in the United States?

A. Yes.

Q. Has the company established certain well-known brands?

A. It has.

Q. In order to establish its brands has it required the expenditure of a great deal of time and money to build up those well-established brands?

A. It has.

Q. When a brand has become well-established, is it a valuable asset to the company?

A. It is. We consider the brands the greatest asset of our company.

Q. During the time that you have been connected with the Lorillard Company have you kept yourself familiar with reference to the general conditions in the tobacco business of the United States?

A. I have.

Q. Will you describe in general the condition of the tobacco business in the United States prior to the United States entering
1008 into the war in 1917?

A. Prior to that time the tobacco business, as long as I have been connected with it, had no peculiar ramifications that would be worthy of note, as I can see it, that would be interesting in connection

with this case; but at the time of the war a condition arose that we had never experienced before. Commodities of all kinds advanced, including the raw material used in the manufacture of tobacco, wrapping material, labor, rents, and everything that is charged against the cost of these manufactured products; and in addition to that there was an enormous increase in the revenue charged by the United States Government on these products, which necessitated a considerable advance in the price of them to the consumer. Owing to conditions attributed to the war there was a shortage of a great many products, and, of course, business was booming during that time, and that condition existed until well on into 1920, at which time a general business depression came over the country, and the tobacco business as well as other businesses felt it considerably. The tobacco business being a highly competitive business in the manufacturing and the jobbing, the retail end of the business probably was affected on that account more than some others, and the jobbers who were our distributors throughout the country generally, on account of the loss of business, became very nervous, and as jobbers generally do when business declines immediately came to the conclusion that their competitors—

1009 Mr. SMITH. I object to any further statement as to his opinion of the conclusions reached by the jobbers.

Mr. CALDWELL. Mr. Examiner, the man is certainly a thorough expert in the tobacco business, and he can state what the general condition was.

Examiner McCORKLE. Do not make your story too long.

A. I was trying to give a general outline that would lead up to a condition that you are interested in in this case.

Examiner McCORKLE. Go ahead.

Q. Mr. Ball, will you tell us what in general was the condition of the tobacco business since the close of the war, and especially during the years 1920 and 1921, throughout the United States?

A. It was more demoralized than at any time in my connection with the business. That was the condition in general.

Q. Will you explain just what you mean by "demoralized"?

A. By "demoralized" I mean that the business was in such a condition that our distributors were practically handling our products at a loss, due, as I tried to tell you, to the general conditions brought about by the feeling existing among the jobbers.

Q. Will you please explain that?

A. The jobbers, as I stated, always attribute a loss in their business to activity on the part of the competitor, and the competitor, according to the jobber's idea, can get business only for one reason, and that reason is selling goods at less than he will sell them for; and, jumping at conclusions in many instances, either right or wrong, they not wishing to lose business, made prices that were very unsatisfactory to them, and injurious to our business and the tobacco business as a whole.

Q. Did that particularly apply during the years 1920 and 1921?

A. Yes.

Q. Will you explain a little bit in detail the tax situation as regards tobacco since the war?

A. The tax has remained unchanged since it was advanced at the time of the war. The cigarette tax was advanced from \$1.05 to \$3.00 a thousand. The tobacco tax was advanced from 8 cents a pound to 18 cents a pound, and that is still in effect; and figured down to the package of 20 cigarettes, such a package carries a tax of six cents, and a ten-cent two-ounce package of tobacco carries a tax of two and a fraction cents.

Q. Does a package of 20 cigarettes carry a tax of 6 cents regardless of the selling price?

A. No; I believe there is a classification of cigarettes above three pounds, but there is so small a quantity of those sold I am not familiar with the tax, but it is greater than it is on the regular cigarettes. The quantity is so small that we call all cigarettes practically under the three dollar tax.

Q. For a package of cigarettes, containing 20 cigarettes, and selling at 10 or 15 cents, the tax is how much?

A. Six cents a package.

1011 Q. Where are the factories of the Lorillard Company located?

A. I will try to enumerate them. I may omit some: New York City; Marion, New Jersey; Wilmington, Delaware; Baltimore, Maryland; Richmond, Virginia; Louisville, Kentucky; Middletown, Ohio; Lancaster, Pennsylvania. I think that is all.

Q. What has been the general method of the Lorillard Company in the sale and distribution of its products in the last five or six years?

A. Our general policy is to sell our products direct to the jobber, who in turn supplies the retail trade, who in turn supply the consumers.

Q. Has the P. Lorillard Company from time to time in years past issued price lists of its products?

A. It has.

Q. Does the company sell to jobbers at a discount from the list price?

A. A trade discount of 10 per cent, 2 per cent for cash in ten days.

Q. About how long has the company been selling its products at that discount?

A. About seven years I should say, roughly, its tobaccos, and about five years its cigarettes.

Q. Is that a discount that is generally recognized by the tobacco manufacturing companies as a fair and reasonable discount to jobbers?

A. Ten per cent has been, to my knowledge, for thirty-two years.

Q. And the 2 per cent for cash is a regularly recognized discount?

A. Recognized for the same period. Tobacco has been sold generally at 10 and 2 off, as we call it, since I have been in the business.

Some manufacturers have during that time sold at a flat price.

1012 Q. How long have you been in the tobacco business?

A. A little over 32 years.

Q. From time to time were you accustomed to travel through the various sections of the United States in behalf of the Lorillard Company?

A. I travelled a great deal up to December 6, 1920.

Q. In general, what was the object of these visits and what classes of people did you visit on those trips?

A. My main object was to visit the head men in our selling force, meeting as many retail men as possible and visiting the principal jobbers in the places where I met our selling force, and as many principal retailers as time would permit.

Q. Was there a time when the products of tobacco manufacturing companies were handled by tobacco jobbers whose exclusive business was the handling of tobacco products?

A. Yes.

Q. If you can do so, will you please tell us what proportion, if any, in recent years of the tobacco jobbers who were previously handlers exclusively of tobacco products have added side lines such as candies, groceries, chewing gum and other things to their tobacco business?

A. The tendency has been particularly since this demoralization that started in 1920 on the part of practically all exclusive tobacco jobbers to add other lines such as chewing gum, candy, etc.

Q. Has this been a detriment to the tobacco business; and if so, why?

Mr. SMITH. I object, because it does not make any difference as far as the allegations in this complaint are concerned, 1013 whether it has been a detriment or a benefit.

Examiner McCORKLE. Answer the question.

A. It has been a great detriment, owing to the fact that the jobber is taking less interest in the tobacco business and a greater interest in these other lines, due to their showing him a living profit.

Q. Do you know, and if so, will you state whether or not from time to time various merchants and tobacco jobbers utilized well-established trade marked goods for advertising purposes and offered well-known trade-marked goods at practically cost or thereabout?

Mr. SMITH. I object to this line of examination because it is quite immaterial as far as the allegations contained in this complaint are concerned. I do not know that the tobacco manufacturing companies could compel or require tobacco jobbers to sell at any particular price. It makes no difference at what price jobbers sold as far as the allegations contained in this complaint are concerned; that is, as far as the satisfaction to the Lorillard Company goes.

Mr. CALDWELL. We are trying out here the general conditions in the tobacco business, and I think we should get all the facts.
 1014 EXAMINER McCORKLE. I do not think you should dwell very long on that phase of it. You have covered it a good deal in your prior questions about the condition of the industry and all that, and I would make that short.

Mr. CALDWELL. The feature of this particular question as differentiated from the other referred to tobacco products and trade-marked products being used for advertising purposes.

EXAMINER McCORKLE. I do not think it is specially material, but let him answer the question.

A. They have in many instances sold our valuable brands at cost, and in some instances at less than cost in order to introduce brands that they control exclusively in that territory.

Q. What effect does that have upon your well-known trade-marked goods?

A. It is quite an injury to our brands because it arouses the antagonism of every other jobber in that section.

Q. You have referred to a demoralized condition in the tobacco business in the years 1920 and 1921. Will you tell us just what you mean by that demoralized condition?

EXAMINER McCORKLE. I think he has told that before.

A. Something similar to that, but I would be glad to tell it again, however.

1015 Mr. CALDWELL. I do not think it has been quite covered.

EXAMINER McCORKLE. Go ahead.

By Mr. CALDWELL:

Q. Tell us that briefly.

A. That demoralized condition in the selling of tobacco products at a price that does not show the distributor a living profit, and in many instances the cost of doing business.

Q. Can you tell us what, in your judgment, brought about this demoralized condition?

A. A general feeling on the part of jobbers that their competitors, owing to the decreased general business, were selling goods at prices less than they were.

Q. From time to time and during your trips did you learn, and if so, will you state, whether or not the tobacco jobbers throughout the country were, as a whole, making a reasonable profit upon the tobacco products which they handled in the years 1920 and 1921?

Mr. SMITH. I object to that question unless it is clear in the question that whether by the word "reasonable" the reasonableness is intended to apply to the Lorillard Company or to the jobbers.

Mr. CALDWELL. I refer to the jobbers.

Mr. SMITH. I object, then, to the question, because this witness has not shown that he is in a position to testify as to what is or
 1016 what is not a reasonable profit to the jobber. It has not been shown that he is in the tobacco jobbing business, and I submit

that what may be a small profit to one tobacco jobber may be a higher profit to another tobacco jobber, depending upon many different things which are self apparent, the cost of distribution, the cost of overhead, and many other things which enter into the proposition as to what is a reasonable profit or a profit at all to any particular jobber, so that it does not appear to me that this witness is qualified to state what would be a reasonable profit to any particular jobber, and consequently, of course, he cannot testify to what is a reasonable profit to all jobbers.

Examiner McCORKLE. It would just be the opinion of the witness, as far as that is concerned. He would not have any facts to base it on, so I will let him state his opinion.

A. In many sections they were not only making a reasonable profit, but were selling the goods at an absolute loss.

By Examiner McCORKLE:

Q. Selling your goods, do you mean?

A. Our goods; yes. I am referring to our goods, but that was pretty general. A reasonable profit to the jobber, of course, varied according to the location and the conditions.

1017 Q. Did that apply not only to the Lorillard goods but to the goods of the other tobacco companies in general?

A. Yes.

Q. Why is the manufacturing tobacco company dependent upon the tobacco jobber for the distribution of his goods?

A. For economic reasons largely. He can get his products to the consumer cheaper that way than in any other, particularly in populous districts.

Q. Did the Lorillard Company become concerned by reason of the demoralized condition of the tobacco business, as you have described?

A. Very much so.

Q. If the tobacco business became thoroughly demoralized in the United States and continued so, would that, in your opinion, lead to the practical ruin or great injury of the manufacturing tobacco companies?

Mr. SMITH. I object to this question because it calls for a wild conjecture. Besides it is not material or relevant to the issues in this proceeding.

Examiner McCORKLE. I think Mr. Ball has practically stated that it would be a great injury to the company, that demoralization would result in injury not only to the jobber but to the manufacturer. He stated that once before.

A. I probably did, but it was so great that I would like to state it in a more forceful manner.

1018 Examiner McCORKLE. It has been stated once. I think that is sufficient.

Mr. CALDWELL. Mr. Examiner, the question I asked before did not go to the extent of this question, and I think we ought to be permitted to go into these things pretty fully once for all, and show

just what the conditions were and what we did to try to help those conditions, and why we did it.

Mr. SMITH. I do not object particularly to that, but I do object to a conjecture, and when it comes to stating what will be the effect of certain things which never took place—that is, the effect never took place—I do object to that.

Examiner McCORKLE. What was Mr. Caldwell's question?

(The reporter repeated the question as follows:)

"Q. If the tobacco business became thoroughly demoralized in the United States and continued so, would that, in your opinion, lead to the practical ruin or great injury to the manufacturing tobacco companies?"

Examiner McCORKLE. Of course, that is entirely speculative; he will have to give a speculative answer but I will let him answer.

A. All I can give you is my opinion based on my best observation.

Examiner McCORKLE. Go ahead.

1019 A. (Continuing.) Certainly to the great injury of the business.

By Mr. CALDWELL:

Q. Did you and the other officers of your company from time to time discuss the general tobacco conditions in the United States in the years 1920 and 1921?

A. We did.

Q. About how many jobbers, dealers, or customers had the Lorillard Tobacco Company in the United States in the years 1920 and 1921?

A. Between 6,000 and 6,500.

Q. Did your company send out from time to time circulars to the trade respecting the policy of the Lorillard Company?

A. They did.

Q. Were those circulars submitted to and approved by you and the president and officers of the Lorillard Company before they were sent out?

A. They were approved by me on all tobacco matters, and by Mr. Belt on all cigarette matters, and where they were something exceptional they were approved by the president also.

Q. Mr. Belt was one of the vice presidents of the company?

A. Yes.

Q. By these circulars did the Lorillard Company endeavor to inform its customers of its policies in reference to the things covered by the circulars?

A. It did.

Q. Have you with you the circulars which were sent out by the Lorillard Company in the year 1921 in reference to this tobacco condition?

A. I have, with reference to this condition; I have not all the circulars.

1020 Q. There were no circulars sent out in the year 1920 such as those that were sent out in the year 1921, were there?

A. No, sir.

Q. Now, will you start with the first circular of the Lorillard Company sent out in reference to these general conditions and give us the number and date and place to which it was sent?

A. No. 1350, sent out May 25, 1921, to the State of West Virginia only; No. 1360, sent out June 29, 1921, to the State of Ohio only.

Q. When you say to the State of Ohio, you mean to the jobber customers in the State of Ohio?

A. All the customers appearing on our list in that particular territory.

Q. The same thing applies to all these circulars?

A. Yes, sir. No. 1363, sent out July 6th, 1921, mailed to Michigan and jobbers located in six towns in Indiana.

Q. Go ahead.

A. Circular No. 1363, dated July 21, 1921, sent to Arkansas, Colorado, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Kentucky, Minnesota, Montana, Nebraska, New Mexico, North Dakota, Oklahoma, South Dakota, Texas, Utah, and Wyoming.

Circular No. 1369, sent out August 3, 1921, mailed to Arizona, California, Delaware, District of Columbia, Illinois, Maine, Maryland, Massachusetts, Nevada, New Hampshire, Oregon, Pennsylvania, Rhode Island, Vermont, Washington, Wisconsin, southern New Jersey, Connecticut, except Stamford, and New York, excepting the metropolitan districts.

Q. And those were all the circulars of this nature that were sent out by the Lorillard Company during the years 1920 or 1921?

A. Yes, sir.

Q. Will you let me have those, if you please?

(The witness produced the circulars referred to.)

Mr. CALDWELL. I offer in evidence these circulars, namely, circular No. 1350, dated May 25, 1921; circular No. 1360, dated June 29, 1921; circular No. 1363, dated July 6, 1921; circular No. 1363, dated July 21, 1921; circular No. 1369, dated August 3, 1921.

Mr. SMITH. No objection.

(The papers so offered and identified were marked "Exhibits A, B, C, D, and E," respectively, and were received in evidence and are forwarded herewith.)

By Mr. CALDWELL:

Q. Mr. Ball, did you learn from time to time of the formation of tobacco associations in different cities of the United States, in 1920 and 1921?

A. Naturally we received information from our men in all parts of the country on matters of that kind and any other that they thought would be of interest to the company.

Q. Did the Lorillard Company at any time have any dealings with any of these various associations as such?

1022 Mr. SMITH. I object.

Examiner McCORKLE. Objection sustained. Bring out the facts.

Mr. CALDWELL. I would like an exception.

Examiner McCORKLE. You may have an exception to the ruling.

By Mr. CALDWELL:

Q. So far as you are aware and have any knowledge or information, did the Lorillard Company, or any of its officials, representatives or agents, have any part in the formation of any of these various tobacco associations?

Mr. SMITH. I object, because he can not say from his own knowledge as to what anybody but himself connected with the Lorillard Company did by way of fostering or assisting in the organization of any association. He can answer as to himself.

Mr. CALDWELL. I asked that question in that particular form, if your honor will notice the question.

You will see that I covered that very point in my question.

Examiner McCORKLE. I understand what the question was. You asked him if he knows what everyone connected with the company did and what everybody in authority did and what was said by officers of the company, and so on.

1023 Mr. CALDWELL. No, my question does not intimate that the witness knows everything that is transpired by every agent of the company or everything that was said by every agent of the corporation. I think the question is proper, asking merely for the knowledge of the witness.

Examiner McCORKLE. I hold that the witness, unless he knows what I have intimated that he should know in order to answer a general question of that kind, would be stating a conclusion and giving his opinion on questions of law; and that he can only answer so far as he knows individually as to what he did and as to what his conduct was in connection with the company.

Mr. CALDWELL. I take an exception to the ruling of the examiner on the record, and state to the examiner that this is very vital to this respondent in this case, and that this ruling is excluding testimony that respondent puts a great deal of stress upon.

Examiner McCORKLE. Go ahead and answer the question.

A. No, sir; not as far as I know.

By Mr. CALDWELL:

Q. So far as you personally know, has the Lorillard Company, or any of its officers, agents or representatives, at any time had any dealings of any nature with these various tobacco associations as such?

Mr. SMITH. I object to that because that calls for a legal conclusion.

Examiner McCORKLE. In the first place, he answered a while ago.

Mr. SMITH. No—an objection to the same question was sustained. It is a proposition of law to my mind as to whether the Lorillard Company—for instance, Mr. Eberbach, president of the Philadelphia

association, was acting personally or for his company or for the association. It is a question of law as to whether these negotiations by an officer of the company like that, with the Lorillard Company was a negotiation between the association and the Lorillard Company or a negotiation between the individual and the Lorillard Company?

Examiner McCORKLE. I think Mr. Smith is correct in that view. I think it would be virtually deciding the case to let this man pass on it here.

Mr. CALDWELL. Do you exclude the question?

Examiner McCORKLE. Yes.

Mr. CALDWELL. I take an exception, and I will state to your honor that it seems to me that no matter what the charge may be 1025 against anybody he is certainly always permitted to make a denial of it in court.

Examiner McCORKLE. He has already denied it so far as he knows, and I let it go.

Mr. CALDWELL. In this instance, too, your honor, I am only asking what he knows.

Examiner McCORKLE. I overrule that question; it is too broad a question. It is a question that covers, as Mr. Smith has stated, questions of law and conclusions, and it is virtually deciding the case. If he knows any facts in any way he is at liberty to give it or answer it.

By Mr. CALDWELL:

Q. Do you know of your own personal knowledge of any facts showing, or tending to show, in your judgment, any dealings of any kind by the Lorillard Company or any of its officers or agents with reference to the various tobacco associations above mentioned?

Examiner McCORKLE. You may answer that.

A. Not to my knowledge.

By Mr. CALDWELL:

Q. So far as you know, did any persons from Philadelphia 1026 ever call upon you, representing themselves to be a committee from the Philadelphia Tobacco Jobbers' Association?

A. No, sir.

Q. Do you know Mr. Eberbach and Mr. Krull?

A. Yes, sir.

Q. About how long have you known them?

A. About eighteen years.

Q. Are they customers of the Lorillard Tobacco Company?

A. Mr. A. B. Cunningham is a customer of the Lorillard Tobacco Company, and Mr. Eberbach is the man in charge of the business.

Q. What about Mr. Krull?

A. Mr. Charles Krull is a customer of the Lorillard Company and Mr. Herman Krull is a son of Charles Krull, in charge of the business.

Q. Have these gentlemen from time to time in years past been accustomed to stopping in the Lorillard Company to see you?

A. They have.

Q. Has it been the practice for years for tobacco jobbers from various parts of the country to call in to see the various officers of the Lorillard Company from time to time when those tobacco jobbers were in the city of New York?

A. It has been.

Q. In general, what were the topics of conversation when tobacco jobbers called to see you or other officers of the company in your business, so far as your personal knowledge and recollection goes?

Mr. SMITH. I object to this question unless it is confined to 1920 and 1921.

1027 Mr. CALDWELL. I will confine the question to those years.

A. General conditions were brought up and most generally the subject of their not making enough money was referred to. That seemed to be a general topic of conversation at all times by most jobbers.

By Mr. CALDWELL:

Q. Do you recall any time when Mr. Eberbach and Mr. Krull called together to see you?

A. I recall one visit that they made together. They may have made other visits together, but I do not recall them.

Q. Have you any way of approximately fixing the date of that call?

A. No, sir; I have not.

Q. Are you able to recall generally the nature of the conversation they had with you?

A. Well, I just answered that question, Mr. Caldwell; general business matters; and if profits were not discussed, or lack of profits, it was a great exception.

Q. Have you any definite recollection of anything that was said by either of them on this occasion when they were both there together?

A. They spoke of the fact that there was a movement in Philadelphia to get a living profit on tobacco profits. That I am positive was mentioned at that time. Now, I could not be positive about the balance of the conversations. It has been a long time ago and

1028 I have those conversations 15 or 20 times a day, and it would be foolish for me to try to say that I could remember specific things, at a specific meeting, and I do not want to go on record as doing so.

Q. What are the general conditions that, in your judgment, should prevail in order that the tobacco business might be conducted profitably to all concerned, including the manufacturer, jobber, consumer, and all handlers of tobacco products?

A. They should make a margin of profit that would cover their overhead, the expense of doing business, and show them a living

profit, and if they are a corporation, enable them to pay a fair dividend on the outstanding stock.

Q. Has the P. Lorillard Company salesmen and field representatives in different sections of the United States; and if so, how long has it had such representatives, to your knowledge?

A. Yes, sir; since December 1st, 1911.

Q. In general, what are the duties of salesmen and field representatives?

A. To sell goods, advertise, sample, do missionary work of various kinds, and keep the office force posted as to conditions in their specific territory.

Q. Have you, your salesmen, or field representatives any authority from the company to establish any policies for the company?

A. None whatsoever, and that is stated on almost every circular we have issued.

Q. Are all matters of policy of the company passed upon by the officers of the company and the officers of the company in New York?

A. They are.

Q. Is that the way in which the policies of the company are established from time to time?

A. Yes, sir.

Q. From time to time has the company received letters from various of its customers making any general complaints about one thing or another concerning the tobacco business?

A. They have.

Q. Has your company from time to time received letters from jobbers complaining about other jobbers?

A. We have.

Q. What in general is the method of your company in dealing with such complaints?

A. If the complaint requires an answer we try to answer it, acknowledge it in a courteous way, and confine ourselves to advising them that the matter will be given careful consideration.

Q. And after that what is done with it?

A. That depends upon the nature of the complaint. Many times it is pigeonholed, other times, if it looks serious, it is taken up with the department affected; in turn, if they are not fully posted, it is taken up with the man in the field.

Q. Has your company ever acted merely and only upon a complaint by a jobber concerning another jobber, or is such complaint always investigated by your own representative and the report of your representative considered by the company before answer?

A. Complaint is always investigated by our representative before action is taken, if we are not fully posted at the time through previous reports of the men in the field.

Q. The policy of your company is, and always has been, never to act upon the complaint of any jobber or individual against any other jobber or individual, but only to act after the matter

has been thoroughly investigated by your own representative and his report received by your company?

A. Yes, sir.

Q. Occasionally, from time to time, have your representatives upon their own investigation, without complaints from any jobber, reported that different individuals were handling your products in a manner that was injurious to your business?

A. Frequently.

Q. When the company received such reports what was the general way in which those reports were handled and how was a decision reached?

A. We generally conferred on important matters of that kind with the president and officers of the company.

Q. Has the Lorillard Company ever had any agreement with any of its jobber customers as to resale prices of its products?

Mr. SMITH. I object to that question. That calls for a conclusion, and also calls for a contradiction of the circulars issued by the Lorillard Company and offered by the Lorillard Company and admitted in evidence.

Mr. CALDWELL. May it please the examiner, that is a matter of argument.

Mr. SMITH. That is why I object.

1051 Mr. CALDWELL. Your statement is argument; that is what I mean. We are trying to give the general policy of this company in a plain, straightforward way, and I think the testimony is absolutely relevant and competent. Otherwise I would not ask it.

Examiner McCORKLE. I will let him answer.

By Mr. CALDWELL:

Q. You can answer that.

A. Not to my knowledge.

Q. Has the company ever had any understanding, either verbally, written or otherwise, with any of its jobber customers as to resale prices?

Mr. SMITH. I object to this question because it seeks to contradict letters in evidence in this case written by Lorillard Company to its jobber customers, or letters which explicitly tell those jobbers what prices at which to resell. This question also calls for a contradiction of Exhibit A in this case, and which the Lorillard Company asks for the co-operation of its jobber customers in getting particular prices for products of the Lorillard Company.

Examiner McCORKLE. Let him answer.

A. Not to my knowledge.

1002 By Mr. CALDWELL:

Q. Did the P. Lorillard Company at any time, in any manner, ever attempt to dictate to its customers the resale price of its goods?

Mr. SMITH. I object to that question for the same reason that I objected to the previous question.

Examiner McCORKLE. It looks to me like your questions are about the same. Can you not get through that line of questions, as to dictating prices involving an agreement on prices?

Mr. CALDWELL. I have not gone into it very fully. It is important.

Examiner McCORKLE. I know it is important, but it has been objected to by opposing counsel, and it necessarily calls for a conclusion in a way.

Mr. CALDWELL. I shall not ask many more questions along that line, but I do think a few of these questions are proper in order to bring out the policy of this company. Mr. Smith has the right, if he feels this is being contradicted by anything that is in the testimony, to argue it, and we have the absolute right to argue that it is not inconsistent in any way.

Examiner McCORKLE. Well, go ahead.

A. Not to my knowledge.

1033

By Mr. CALDWELL:

Q. Did the Lorillard Company seek to get its jobber customers to sell its products at such a price as would enable the jobber customers to pay their bills and to prevent the demoralization in the tobacco business?

Mr. SMITH. I object to this question because the witness does not know, may it please the examiner, what prices particular jobbers have to get for the purpose of paying their bills for any other purpose.

Examiner McCORKLE. He has gone into the question about demoralization, and so on, and I will let him answer the question.

A. They did.

By Mr. CALDWELL:

Q. Why did the P. Lorillard Company not sell its goods directly to the retail trade?

A. Because they could handle them more economically, to better advantage, through the jobber.

Q. Is the P. Lorillard Company interested in the jobbers securing a profit for the Lorillard products; and if so, why?

A. We are interested to the extent of their being able to pay for their merchandise they purchase and to continue their interest in marketing our products, for which there is already a demand, 1034 and introducing the new brands we bring out from time to time.

Q. What considerations determine the policy of the company when an application is made by an existing dealer to be put on the direct list of jobbing customers as a buyer?

A. The first consideration is, are they legitimate jobbers; the next consideration, have they money to pay for their purchases; and the next consideration is, is it to our interest to sell them.

Examiner McCORKLE. We will adjourn until half past one o'clock. (Thereupon, at 12.15 a recess was taken until 1.30 o'clock p. m.)

AFTER RECESS

The hearing was resumed at 1:30 p. m., at the expiration of the recess.

Examiner McCORKLE. Proceed.

DAVID H. BALL, the witness on the stand at the taking of the recess, resumed the stand and testified further as follows:

By Mr. CALDWELL:

Q. Mr. Ball, prior to the recess hour, I asked you what considerations determined when an application is made by an existing
1035 dealer to be put on your company's direct list of jobbing customers as a buyer, and I think in your answer you used the expression—

A. (Interposing.) Three things.

Q. Wait a minute—legitimate jobber?

A. Yes, sir.

Q. Will you please explain what you mean by "legitimate jobber"?

A. A legitimate jobber is a dealer who buys our products to resell to the retailer.

Q. Are there some instances in which you resell to retailers; and if so, can you tell us about them?

A. There are some instances. You ask me what the general policy was?

Q. Yes.

A. And I answered that question in that way. There are exceptions that are made to that general policy, as well as a great many other things in the business. For example, we sell in the State of Montana quite a few retail dealers our products direct, and that has largely been brought about by inheritance. Twenty years ago the State of Montana was not covered by jobbers. The stores were so far apart that the jobbers could not afford to work them, and in order to get your products on the market there we had practically to go to the retail trade direct. Now, through the South, there are a great many large commissaries that buy enormous quantities of tobacco, and these commissaries have always purchased their tobacco products direct. I do not say always, but in many instances they have, and in order to sell your goods to those fellows you have
1036 to sell them direct and give them the benefit of the jobbers' discount. We also sell our products direct to some large chain retail stores, such as the United Cigar Stores, and our general policy is as given in my answer to your previous question.

Q. Were any instructions given; and if so, what, given by your company to your salesmen or field managers in reference to the circulars which have been offered in evidence which have been sent out from time to time by your company?

A. I do not recall that there were any general letters written on that circular, any more than we write letters on other circulars.

unless there was ambiguity, that our men could not understand them, and then we explained them; but we try to make our circulars so plain that there is not any misunderstanding on the part of our men at least. The jobbers misunderstand them, and the men are called upon to explain them, particularly if the deals and offers are in anywise complicated.

Q. In reference to these particular circulars which have been put in evidence to-day, were there or were there not any specific instructions given to the field representatives and the salesmen?

A. As I told you, I do not recall any specific written instructions. We had verbal conversations with our men a number of times.

Q. What was the general drift of the verbal conversations?

A. The men were instructed that the circular meant practically what it said, and that if they were called upon to discuss that circular, we put particular stress on two things, and if these 1037 instructions were not followed it was because the men totally violated them. One was that after talking with the jobber, if this question was raised, to have it clearly understood that there was no agreement, we asked him to agree to nothing; and the other was that under no circumstances he should connive or conspire with any other jobber to injure his competitor. Those two features were brought out very specifically in every interview that we had with the men.

Q. Will you state if you know what were the general conditions prevailing in West Virginia that led to the sending out of your first circular on May 25, 1921, to West Virginia?

A. In West Virginia we have a large volume of business, probably sixty per cent of the total tobacco business of the State. Owing to the character of the country, the cost of doing business in West Virginia is much greater than it is in many other sections. The character of the jobbers in West Virginia is generally very large reputable houses, with a great deal of money invested in their business, and when this terrible demoralization arose, West Virginia, like many other sections, was affected, and these jobbers made repeated appeals to us that the tobacco business was getting to the point that it was not at all interesting to them, threatening in instances to 1038 discontinue handling tobacco unless they could at least make the cost of doing business, and in some instances had started to curtail their standing orders—reduce them. This condition, after being thoroughly investigated by us, we were fully convinced, was a great injury to our business in West Virginia, and we decided to issue this circular declaring ourselves, believing that the trade allowance that we were providing for the jobber was a fair margin of profit for handling our goods, and asking them to cooperate along the lines of bringing about a better condition than existed at that time.

Q. In general, was that the same policy that actuated the Lorillard Company in sending out its other circulars?

A. Yes.

Q. Did your company ever threaten or authorize any of its agents, salesmen, or representatives, to threaten any jobber that he would be unable to get the Lorillard Company's products unless he joined a tobacco association?

Mr. SMITH. I object to this question, in so far as it goes beyond the knowledge of this witness. I have no objection to his speaking of his own knowledge, but he manifestly cannot speak as to all the officers, officials and agents of the Lorillard Company.

Examiner McCORKLE. Answer the question.

Mr. CALDWELL. So far as you know.

A. I would like to answer it that way—not to my knowledge.

Q. And you were familiar, were you, with the general instructions and general things that went on in the company's office?

1039 A. I was, as I gave most of the instructions pertaining to West Virginia. Our cigarette business in that section of the country was very small, and we usually handled those matters—if the tobacco interest dominated in a territory, I generally handled that, and if the cigarette business dominated, Mr. Belt looked after that.

Q. So far as you know, were any of your agents or field representatives or employees authorized at any time to make any threats to anybody?

Mr. SMITH. I object to that question.

Examiner McCORKLE. That is simply a repetition of your other question, isn't it?

Mr. CALDWELL. No. I am asking him if they were authorized to do it. I asked him before if they did it.

Mr. SMITH. I object to this question, Mr. Examiner.

Examiner McCORKLE. You can ask him if he authorized anybody.

Mr. SMITH. I have no objection to his answering that.

A. Not to my knowledge.

Q. So far as you know, did your company withhold any shipments from any jobber because of any failure on his part to join any tobacco association?

A. Not to my knowledge.

Q. So far as you know, did you company at any time co-operate with any tobacco association as such?

1040 Mr. SMITH. I object to that.

Examiner McCORKLE. The objection is sustained.

Mr. CALDWELL. Exception. May it please the examiner, I would like to state that, if this question was permitted to be answered, I would show by this witness that the company did not at any time co-operate with any tobacco association as such.

Examiner McCORKLE. That is, you would attempt to show that?

Mr. CALDWELL. Yes, sir.

Mr. SMITH. Mr. Examiner, I desire to make this statement for the record. It does not seem to me to be material whether the Lorillard Tobacco Company co-operated with an association as such, as long as it co-operated with the association.

Examiner McCORKLE. Well, the question of co-operation is a question of law and a question of argument and a conclusion.

Mr. CALDWELL. I will strike out the words "as such."

Examiner McCORKLE. Proceed with another question.

Mr. CALDWELL. I will adopt Mr. Smith's suggestion.

Examiner McCORKLE. Go to something else. You have asked that enough. I shall rule it out anyway, "as such," or whether you asked him the broad question as to whether they co-operated in 1941 any way with the association in regard to disposing of their products, and so forth. I think that is a question of law as to whether they did or not.

Mr. CALDWELL. I would like to state on the record that, if I were permitted to ask that question, I would show by this witness that the Lorillard Company did not at any time co-operate with any tobacco association.

Examiner McCORKLE. That is founded altogether on the facts, which will have to be found by the commission.

Mr. CALDWELL. Well, I am trying to bring out those facts.

Examiner McCORKLE. You just simply—this gentleman is just giving a conclusion.

By Mr. CALDWELL:

Q. So far as you know, has the Lorillard Company, in 1920 or 1921, or at any other time, invited jobbers to report that other jobbers were cutting prices?

A. No, sir.

Q. Has your company at any time arranged for any system or machinery for jobber reports?

A. Not to my knowledge.

Q. Has your company ever maintained any system of records to keep you advised as to jobbers who cut prices?

A. Not to my knowledge.

Q. You have spoken of 10 per cent as a reasonable profit to jobbers. It is the view of the company that the jobber should in all places retain the full ten-per cent?

A. I was just thinking as to how I can answer that question as briefly as possible. Well, we would like to see that condition exist, but my experience in the tobacco business has been that in some sections it is impracticable to have it exist.

Q. So far as you know, have any of the salesmen or representatives in the employ of the Lorillard Company any joint arrangement with jobbers so that they represent at the same time the Lorillard Company and any jobber?

A. No, sir.

Q. So far as you know, is the only interest of the salesmen of the Lorillard Company the preservation and extension of the business of the Lorillard Company?

A. Yes, sir.

Q. Will you define to us what is commonly known as a sub-jobber?

A. A sub-jobber is a dealer who sells at wholesale, securing his supplies from a jobber or a direct customer of ours.

Q. Is it at the present time or has it in the past been any part of the policy of the Lorillard Company, or is it of any particular interest to the Lorillard Company, that the sub-jobber should be eliminated?

A. No, sir.

Q. So far as you know, did your company have anything at any time whatever to do with the prices of discount fixed by the tobacco associations, if they were so fixed, at Philadelphia or Cincinnati?

1043 Mr. SMITH. I object to that, Mr. Examiner, because that seeks to contradict the exhibits offered in evidence and admitted through the testimony of this witness, which exhibits on their face ask the jobber customers of the Lorillard Company to co-operate in securing list prices for Lorillard Company's products.

Examiner McCORKLE. Let him answer that.

A. No, sir.

Q. Do you know a Mr. Charles Seider of Philadelphia?

A. No, sir. I have never met the gentleman in my life. I have met his son.

Q. Do you know his son?

A. Yes, sir.

Q. Do you remember his first name?

A. No, sir; I do not. I never met him but once or twice.

Q. Do you recall a visit to you of Mr. Charles Seider's son, of Philadelphia, in 1920 or 1921?

A. Yes, sir. I recall the visit. I do not recall a great deal of what happened at the time.

Q. Will you please state so much, if anything, that you can remember of what he said and what you said?

A. All I can state specifically that I remember was that Mr. Seider visited me after we had discontinued shipments to him, with a view to having us change our ruling, which I refused. Now, of course, there was quite a little conversation. What happened I could not begin to relate, and would not try to, because it would be guess-work, but there was one question that he asked me on

1044 his visit that impressed itself strongly upon me, as things will for probably no reason whatsoever. You can remember things that happened forty years ago, little things, and lots of big things you cannot recall.

Mr. SMITH. Well, let us have the witness state what it was and not argue the proposition.

The WITNESS. Well, it was this. He asked me if he joined the Philadelphia Jobbers' Association, would we sell him, and I told him no; that it would have no bearing or no influence on us whatever.

Q. Do you recall anything that he stated to you in reference to what discounts Charles Seider, of Philadelphia, was selling his goods—your products?

A. The exact figure I do not recall, but he confirmed my opinion that we had taken the right move in the statement he made of prices he was securing, because they were so low that he or nobody else could handle the goods and make a profit at the figure.

Mr. SMITH. I move to strike out that part of the answer, Mr. Examiner, which seeks to argue the proposition, and upon the further ground that this witness does not know at what prices Mr. Seider could sell to enable him to make a profit. At least, he has not shown it.

Mr. CALDWELL. I object to the matter being stricken out, 1045 your Honor, and state that he is trying to recall as best he can the substance of this conversation, and that is what he is doing in his answer, and he has a right to give his recollection.

Mr. SMITH. Mr. Examiner, it seems to me that the witness should be informed that he should answer the questions responsively. Where he is asked to state the conversation, he can state the conversation and not pass his observations or his conclusions upon the things that were said. Let him testify to what was said when he is asked to testify to a conversation, and not give his judgment of it or his conclusion of the conversation.

Examiner McCORKLE. That is proper.

Mr. SMITH. Or place any construction upon the conversation.

Examiner McCORKLE. Give the substance of the conversation and no comments of yours.

Mr. CALDWELL. Give us your best recollection——

Examiner McCORKLE (interposing). As to what was said.

By Mr. CALDWELL:

Q. Yes; what was said, not the words, but the substance of what was said, in reference to the discounts at which he was selling the Lorillard products.

A. He stated the discount, which I do not recall, but I do recall that it was so low that it impressed us that our ruling 1046 in discontinuing his account was the correct one.

Q. Do you recall having had an interview at Cincinnati, Ohio, with Mr. G. O. Fennell, of that city? If so, state when and where and what was the conversation, to the best of your recollection?

A. It was on November 18th at the Sinton Hotel.

Q. November 18th of what year?

A. 1920.

Q. Where is the Sinton Hotel?

A. In the lobby of the Sinton Hotel.

Q. Where is the Sinton Hotel?

A. Cincinnati, Ohio.

Q. Go ahead.

A. On November 18th, 1920, I had been out to Mr. Fennell's place the evening before, and found him out, and left word that I would like to see him the next morning, I think it was, and he came down

and I had a very friendly talk with Mr. Fennell, who was one of our new accounts, and who had been complained of by other jobbers, and had been reported by our men as selling goods at such prices that would not enable him to make anything and were demoralizing and injurious to our business.

Mr. SMITH. I object to that, Mr. Examiner, and I move to strike out these observations from this witness and his conclusions and guesses.

Mr. CALDWELL. Those are not conclusions or guesses. Those are statements.

Mr. SMITH. I think the counsel should be permitted to
1047 finish his objection, Mr. Examiner. He is called upon to state a conversation that he had with Mr. Fennell on November 18th, 1920, at the Sinton Hotel. Now, let him tell the conversation.

The WITNESS. I could not tell the conversation, your honor, if my life depended on it.

Examiner McCORKLE. If you can not do it, that is your misfortune.

The WITNESS. I am giving you the best——

Examiner McCORKLE (interposing). You are giving your impressions about various things and commenting on them and making a statement that his conduct was demoralizing the business and various thinks of that kind. That is improper. You are to tell your conversation, or the substance of your conversation. That is what you are asked to do.

The WITNESS. That is what I am trying to do.

Examiner McCORKLE. But you are commenting on it and going outside of that.

The WITNESS. It is humanly impossible——

Examiner McCORKLE (interposing). You are talking about some prices that were demoralizing the trade. That is your opinion!

The WITNESS. Yes, sir.

Examiner McCORKLE. It may not be Mr. Smith's or my opinion or the stenographer's opinion!

1048 The WITNESS. Yes, sir.

Examiner McCORKLE. You are not to state that. You are just to tell the substance of your conversation with him.

The WITNESS. Well, the substance of our conversation was that we had shown a friendly spirit to him by adding him to our direct list, and did not believe he would make such prices as were injurious to our business.

Q. Did you tell him anything as to what you had heard stated in reference to the prices at which he was selling?

A. I may have, but I cannot recall those details.

Q. What is your best recollection of what Mr. Fennell stated to you on that occasion?

A. Mr. Fennell accepted the conversation that I had with him in the very best——

Q. (interposing). No; what did he state, Mr. Ball?

A. Of spirit. He said that he did not want to—he realized that we were his friends; he was endeavoring to get on the list of other manufacturers, and we were one of the first to place him on the list, and he did not want to do anything that would in any way injure our business.

Q. Mr. Fennell in his testimony at Cincinnati said something to the effect, as I recollect it, that you stated it made no difference to the Lorillard Company at what prices he was selling your products, but that there were certain large jobbers in Cincinnati whose statements or interests, or something of that kind, you had 1049 to regard. I have not got it exactly, but do you recall anything of that conversation in reference to any other dealers in Cincinnati?

A. I would not recall sufficient of that conversation to answer that question in detail at all, Mr. Caldwell. You talk to a man for half an hour, and I think it is humanly impossible, particularly if it is just in the ordinary run of business, to two years later recall that conversation.

Q. Were there at that time in Cincinnati the dealers whose opinions or wishes or interests or views that you, as an officer of the Lorillard Company, had to respect in dealing with any other of your customers?

A. Lorillard Company always runs the business in a manner that they think is to its best interest, but in a market the size of Cincinnati, when a number of jobbers make a complaint and threaten the loss of interest in the distribution of our products, we would naturally give those individual complaints consideration. In other words, we would not consider it a friendly act for one small jobber to go out and antagonize eighteen or twenty other jobbers who distributed probably ninety-five per cent of our products.

Q. Did the Lorillard Company at any time cut off Mr. Fennell from your direct list?

A. No, sir.

Q. So far as you know, did you or any officer of your company at any time suggest that jobbers should hold conferences, and that the manufacturer would assist them by refusing shipments or withholding orders from anyone at their request?

1050 Mr. SMITH. I object to that question, Mr. Examiner, because that seeks to contradict the written proof of the facts, which written proof has been offered and admitted in evidence to the testimony of this witness.

Mr. CALDWELL. I would like to state—

Examiner MCCORMICK. Let him answer it.

Mr. CALDWELL. Just one moment. I would like to state that I do not know of any rule whereby—

Examiner MCCORMICK. I have ruled on it. Go ahead and answer the question.

A. Repeat the question, will you please?

(The reporter thereupon repeated the pending question as follows:)

"Q. So far as you know, did you or any officer of your company at any time suggest that jobbers should hold conferences, and that the manufacturer would assist them by refusing shipments or withholding orders from anyone at their request?"

A. No. Answering that question as a whole.

Q. Will you explain what is known as the mail order business in the tobacco trade, if any exists?

A. The mail order business is a business engaged in by various houses who secure their business solely by sending catalogs to their prospective customers.

1051 Q. How is that business regarded by your company?

A. We do not sell mail order houses, believing it injurious to our business.

Q. Will you please tell us what is known in the tobacco business as co-operative jobbers or houses?

A. Co-operative houses, in a general way, are bodies of retail dealers who come in together and establish a buying agency to supply them with their wants.

Q. What is the general policy of the Lorillard Company with reference to such?

A. Our general policy is not to sell co-operating houses.

Q. And why?

A. Co-operative houses operate largely on the basis of a mail order house, other than they sell to their stockholders only such merchandise as their stockholders have a demand for, and our principal reason for not selling co-operative houses is their inability to sell anything other than brands that the retail dealer must have and do it at a price that is injurious to the business.

Q. Does the Lorillard Company have, or did it ever have, a list of which undesirable customers or price cutters were placed?

A. No, sir.

Q. Has the Lorillard Company ever adopted or has it any resale price plan?

A. None other than those appearing in our established price lists to the retail dealer through the jobber and to the consumer, as represented by the price packages. By price packages I mean we indicate on our price list where we have a brand put up in various sizes the price at which that brand is supposed to be offered to the consumer.

By Examiner McCORMACK:

Q. You mark it on the box?

A. That is a package, your honor. The price per package to the consumer is not put on the box. The consumer never sees the box in which the tobacco comes—so many ten-cent packages, so many

fifteen-cent packages, so many twenty-five cent packages, so many fifty-cent packages, and so many dollar packages. That is the way we designate our various sizes in our price list.

By Mr. CALDWELL:

Q. Has the Lorillard Company ever adopted or has it any resale price plan which in its practical operation constrains its jobber customers, if they would have the company's products, to maintain prices suggested by it?

Mr. SMITH. I object to that question. It calls for a legal opinion.

Mr. CALDWELL. It calls for a fact, your honor. It calls for a question as to whether it has any such plan. Now, I am trying to get at the facts in this, and Mr. Smith will have a full opportunity to cross-examine on all these things, and I want to bring out that general policy of the company.

1053 Examiner McCORKLE. Was not this question practically answered in the one before this?

Mr. CALDWELL. No, your honor; it was not covered by the other question. Otherwise I would not have asked it.

Examiner McCORKLE. Read the question.

(The reporter thereupon read as follows:)

"Q. Has the Lorillard Company ever adopted, or has it any resale price plan which in its practical operation constrains its jobber customers, if they would have the company's products, to maintain prices suggested by it?"

Examiner McCORKLE. That is a rather complicated question to me.

Mr. CALDWELL. I do not think so. It is a simple question to one who is familiar with the business.

Examiner McCORKLE. What do you mean by constraining your agents to maintain prices?

Mr. CALDWELL. It did not refer to agents at all.

Examiner McCORKLE. Constraining your customers?

Mr. CALDWELL. "Constrain" is used in the ordinary sense of the word. By that it is meant that they are constrained, that they have to do it; otherwise they do not get the goods.

Examiner McCORKLE. It seems to me you have embraced that idea in two or three questions before that.

1054 Mr. CALDWELL. I have not covered that constraining feature of it, your honor, which is an important feature, as I see it.

Mr. SMITH. He has not asked the witness' legal opinion up to this question.

Mr. CALDWELL. He is the manager of this business. It is not legal. These are all calling for facts.

(After further discussion, which the reporter was directed not to record, the following occurred:)

Examiner McCORKLE. You may ask the question if you put it in simpler language.

Mr. CALDWELL. I except to this ruling, and I will try to see if I can frame it differently. I cannot do it and bring in all of these features.

Examiner MCCORMICK. Well, I will not permit that question.

Mr. CALDWELL. I would like to state that, if I were permitted to ask that question and have it answered, I would show by this witness that the company has no such plan.

Examiner MCCORMICK. Do you know what the witness is going to answer?

Mr. CALDWELL. Yes, sir.

Examiner MCCORMICK. I am sure I do not, and I do not see how the attorney does.

Mr. CALDWELL. That is what I hope to prove. I will state that. That is what I hope to prove by this witness.

1055 Examiner MCCORMICK. All right. You can say that.

Q. Has the Lorillard Company adopted at any time, so far as you know, any resale price plan which in your judgment constrains the jobber to maintain prices?

Mr. SMITH. I object to that question, Mr. Examiner.

Examiner MCCORMICK. The objection is sustained.

Mr. SMITH. It calls for the witness' conclusion.

Mr. CALDWELL. Exception. Now, your honor, it seems that a man who has had 30 years of practical experience in this business is certainly a sufficient expert in that business to answer that question, and he ought to be permitted to answer these questions from a practical point of view.

Examiner MCCORMICK. The question is ruled out.

Mr. CALDWELL. Exception; and I will state again that if this question were permitted to be answered I would expect to prove that the company has no such plan.

Q. Has the Lorillard Company ever adopted any plan subjecting its jobber customers to be reported to the company for failure
1056 to maintain prices at which the company may desire to have its products resold?

A. No; not unless the condition arose that would cause our men in the territory to feel that the prices at which our products were being sold were injurious to our business.

Q. Well, have the men any such instructions to report that particularly?

A. No, sir.

Q. Has the Lorillard Company ever adopted or enforced any system of fixing and maintaining certain specific prices at which its products shall be resold by purchasers thereof?

A. No, sir.

Q. Has the Lorillard Company in the years 1920 and 1921 frequently sold and resold to jobbers known to the Lorillard Company to be so-called price cutters?

A. Yes, sir.

Q. Tell us, if you can, what proportion of your company's products are sold to jobbers that do not retain the full ten per cent discount provided by the company for the jobbers?

Mr. SMITH. I object to this question, because it seems to be predicated upon the immediately previous question. Now the jobber may not be a price cutter, because he does not get list less two per cent for the products of the Lorillard Company, and since this question seems to be so framed as to be a part of an implication that a jobber who sells at better than list less two per cent is a price cutter,

I object to it because it is an improper construction to be placed on the immediately previous question.

Mr. CALDWELL. May it please the examiner, I am entirely eliminating the price-cutting proposition from this question, and going to something entirely different. I have dropped that price-cutting proposition and it has no reference to it.

Examiner MCCORMICK. With that understanding, he can answer it.

Mr. SMITH. I do not object, with that understanding.

A. Repeat the question.

(The pending question was read by the reporter as follows:)

Q. Tell us, if you can, what proportion of your company's products are sold to jobbers that do not retain the full ten per cent discount provided by the company for the jobbers?

A. That would depend entirely on localities, and it would be impossible for me to do other than to give you a guess on the whole as to what proportion was sold in that manner.

Q. Well, can you state whether or not the company has sold and resold over and over again to its jobbers who do not retain the full ten per cent discount provided by the company?

A. Yes, sir.

Q. Have you any means of knowing, or do you know so as to be able to answer intelligently, what relative proportion of your tobacco jobber customers at Philadelphia or Cincinnati have not in 1920 or 1921 retained the full ten per cent discount provided by the company?

A. In Philadelphia, practically none of them have. In Cincinnati there would be a proportion, but just what that proportion would be I could not do any more than guess.

Q. Can you state whether, without absolutely guessing, the larger proportion retain the full ten per cent, or whether the larger proportion do not retain the full ten per cent?

A. In Cincinnati you are referring to?

Q. Yes.

A. I would say in Cincinnati the largest proportion at that time did not retain the ten per cent, and many were so insignificant as to bring about an injury and a demoralization that was very bad for our brands.

Q. Do you know what has been the reputation of the Philadelphia tobacco market for price cutting for the past five or six years?

Mr. SMITH. Just a minute. I object to this question, unless there is signified in this question what is meant by the term "price cutting." There are different kinds of price cutting.

Mr. CALDWELL. I withdraw that question.

Examiner McCORKLE. He withdraws the question. Strike it out.

1059 By Mr. CALDWELL:

Q. Mr. Ball, there is an expression, I believe, that is commonly used in the tobacco business as "price cutting," isn't there?

A. Yes, sir.

Q. Will you tell us what is the general acceptance or the meaning in the tobacco business of that term?

A. The term "price cutting" is generally referred to—let me answer that a little differently. The term "price cutting" would vary according to the market in which it was used. In Philadelphia, jobbers selling goods at two or three per cent off of the list price, and they would not be termed as price cutters. In West Virginia the conditions would be entirely different. In Cincinnati they would be different.

By Examiner McCORKLE:

Q. Just in what way, as you go along. You gave per cent in one, and give me per cent in the other, for instance, in West Virginia?

A. In West Virginia those selling at less than list would be termed price cutters.

By Mr. CALDWELL:

Q. Now you were starting to say something about Cincinnati.

A. In Cincinnati those giving more than three per cent would be termed price cutters.

1060 By Examiner McCORKLE:

Q. Off the list, you mean?

A. Yes, sir.

By Mr. CALDWELL:

Q. With that definition, do you know and can you tell us what has been the reputation of the Philadelphia tobacco market for price cutting for the last five or six years?

A. It has been generally referred to as the greatest cut-price market in the United States—that and New York City.

Q. Notwithstanding the Lorillard Company has known for five or six years that the Philadelphia jobbers have been cutting prices, as you have just described, has the Lorillard Company continued to sell them its products?

A. We have.

Q. And does the same thing apply to Cincinnati, with the modifications as to the amount which you have stated?

A. Yes; but Cincinnati has never sold goods on the basis that Philadelphia has, only up until 1920 it got down to a basis almost as bad.

Q. Notwithstanding the price cutting, so to speak, in Cincinnati your company did continue to sell to its customers whom it knew were cutting prices?

A. We did.

Q. You are familiar with the policies and practices and systems and plans of the Lorillard Company from time to time, are you not?

A. The selling end of it; yes, sir.

1061 Q. Has the Lorillard Company ever adopted or had any plan, system, or practice whereby the company and its jobber customers worked together and cooperated to prevent those who cut prices from purchasing from your company its products?

A. No, sir.

Q. Does or has the Lorillard Company ever selected any of its customers with a view to or because of any willingness on their part to resell the company's products at resale prices suggested by it?

A. No, sir.

Q. Has the idea of the jobbers' willingness to resell the company's products at resale prices suggested by the company, if any such suggested, ever in any way entered into the selection of jobber customers by the Lorillard Company?

A. No, sir.

Q. Mr. Ball, I show you a letter addressed to George O. Fennell and signed D. H. Ball, upon the letterhead of the Lorillard Company's paper, dated May 20, 1921, being commission's Exhibit No. 70, and ask you if you will refer to it and state what you mean by the next to the last paragraph therein?

A. You mean the paragraph which says "We trust it will be your pleasure to cooperate with the movement on our line of merchandise?"

Q. Yes, sir.

A. I simply meant this: That we had been advised that the various jobbers were so thoroughly disgusted with existing conditions that they had decided to make an effort to change them, and requested that Mr. Fennell would not in any way block this effort or
1062 act in a capacity that would be injurious to the situation of bringing about a better condition.

Q. What do you mean by a "better condition"?

A. A condition that assures them a living profit for handling our merchandise. That is the whole thing. That is what we are talking about.

Q. Now I show you commission's Exhibit No. 71, which is identical with commission's Exhibit No. 70, except that it is addressed to August Janszen, Jr., and ask you if the same answer which you have made with regard to Exhibit No. 70 applies to Exhibit No. 71?

A. The same answer.

Q. Do you recall whether or not the Janzen Grocery Company was ever cut off from your list of direct buyers?

A. No, sir; they were never cut off.

Q. Were their orders held up for a time?

A. Yes, sir.

Q. Do you recall what was the cause of their orders being held up for a time?

A. Well, their orders were held up because the information we had from our men was to the effect that they were inclined to disregard our appeal for them not to injure our business, and until we could satisfy ourselves that they were not going to injure our business further.

Q. What in general would you consider an injury to your business?

A. An injury to our business in the matter of price cutting, you mean?

Q. Yes.

A. Or selling prices?

1063 Q. Selling prices.

A. I have in a general way covered that, but an injury to our business is a movement on the part of a very small percentage of our distributors to sell our merchandise at a price which does not insure them a profit.

Q. Will you please make that plain, why that is an injury to your business?

A. If you have one hundred jobbers in a State that are distributing your products, and one jobber goes out and demoralizes the situation and antagonizes—by selling goods at less than a living profit to such an extent that it antagonizes the other ninety-nine, it is bound to prove to be an injury in lessening the interest and effective working of the big percentage of our distributing power.

Q. Why does the antagonism of the ninety-nine per cent act as an injury to your business?

A. Because we are depending upon these people to distribute our products. It is all we have got in that territory, and they are handling it, and if we have ninety-nine interested and working and pushing our products, we are benefitted, and if we have one dealer antagonizing the ninety-nine to such an extent that they have lost all interest in tobacco, putting in our products and working and selling tobacco only when they have got to, and in some instances quit handling it all together, if that is not an injury to your business I do not know what is.

Q. In general, is the thing that the Lorillard Company has
1064 in view the price at which any jobber sells or resells your products, or is it the resultant injury to your business?

A. The resultant injury to our business.

Q. So other than the fact of the resultant injury to your business, you are not interested in any way, shape, or form, in any price at which any man may sell or resell your products?

A. No, sir.

Q. And does that vary in different localities?

A. Yes, sir.

Q. Now Mr. Ball, I have tried to cover pretty thoroughly the policy of the Lorillard Tobacco Company in these various matters.

but I would like to ask if there is anything that you think of that I have omitted which you wish to state; if so, please so state now.

A. I do not recall anything. I presume I could go over general matters that might be interesting to these gentlemen, but I think the points have been brought out pretty generally in reference to the subject on which we are called down here.

Cross-examination by Mr. SMITH:

Q. Mr. Ball, do you have with you a form letter used by the Lorillard Company in 1921, sent to its jobber customers who were complained of to your company?

A. Yes, sir.

Q. May I have it?

A. (A paper was shown to counsel for the commission.)

Q. Do you have with you any other form letters used by your company in 1921 on the same subject?

A. Yes.

1065 Q. You have now handed me two form letters used by your company, as you have testified, in 1921. Were there any form letters in addition to these two that you handed me which I now have which were used by your company in 1921 on this same subject?

A. Those two—

Q. (Interposing.) Addressed either to the jobber customer complained of or to a jobber making a complaint?

A. To a jobber making a complaint there was; yes, sir.

Q. Do you have such form letter with you?

A. No; I do not.

Q. Did you bring them to Washington?

A. No, sir. I will be glad to forward you one as soon as I get back.

Mr. SMITH. These two form letters I will ask to have marked for identification. I will ask that one of them be marked "Commission's Exhibit No. 122" and the other "Commission's Exhibit No. 123."

(The papers referred to were thereupon marked as requested "Commission's Exhibit No. 122" for identification and "Commission's Exhibit No. 123" for identification.)

Q. Will you tell us what the Lorillard Company used this paper known as commission's Exhibit 122 for?

A. To send to jobbers whom we thought were demoralizing a situation that was injurious to our business.

1066 Q. And in using the words "demoralizing a situation" do you mean that those jobbers would be selling at discounts better than discounts that were prevailing among the majority of the jobbers in that particular locality?

A. Generally speaking, yes.

Q. Was this letter sent to that jobber after you had received some complaint from some other jobber in the same territory?

A. No, sir.

Q. Was it sent because of reports you had gotten from your own men?

A. Yes, sir.

Q. Commission's Exhibit No. 123, for identification, I assume, was used for the same purpose as you used 122?

A. Yes, sir.

Q. That paper also was sent to jobbers, who, to use your own language, would be demoralizing the situation in a particular community?

A. To the injury of our business.

Q. And these are the only form letters that you have brought with you to Washington?

A. Yes, sir.

MR. SMITH. I offer both of these and ask that they be marked, respectively, "Commission's Exhibits 122 and 123."

(The papers referred to, so offered and identified, were thereupon received in evidence, marked, respectively, "Commission's Exhibits Nos. 122 and 123," and are forwarded herewith.)

Q. When were those form letters gotten up?

A. Sometime during 1921.

1067 Q. After the issuance of your circulars known as 1359, 1360, 1363, and 1369?

A. I would not say that it was after the issuance of all of those. It was after the issuance of at least the first one.

Q. After your circulars were issued to the trade—that is, the circulars commencing with No. 1359—did you get letters from some of your jobber customers complaining about the discounts given other of your customers?

A. At times; yes, sir.

Q. And would you use those letters similar to Exhibit 122 and Exhibit 123 in writing to those jobbers who had been complained against?

A. If we wrote them at all.

Q. Well, did you write letters similar to Exhibits 122 and 123?

A. Well, we use that form; yes.

Q. Those forms were used?

A. Yes, sir.

Q. Did I understand you to say that you had a form letter which you used in acknowledging a complaint made by a jobber against another jobber?

A. Yes, sir.

Q. Will you please tell us the substance of that letter which you used?

A. That letter was merely a courteous acknowledgment of their complaint and embodied in it the fact that the matter would receive our consideration.

Q. And I assume that the matter did receive your attention?

A. At times it did and at times it did not. In fact, more often it did not than it did.

1068 Q. Before you wrote the jobber complained against the letter 122 and the letter 123, did you have an investigation made by any of your own men as to the merits of the complaint against that particular jobber?

A. Certainly.

Q. What kind of an investigation did you men make of those complaints?

A. Well, they went to that neighborhood and generally I presume went to the man complained of first and had a talk with him in reference to the matter, and they had little difficulty in getting practically all the information they wanted from that man himself, and if it was necessary to go any further they went to some of his customers and made inquiry.

Q. Did they go to some of your customers to make inquiry also?

A. They probably did.

Q. That was a part of the instructions you gave to them, wasn't it?

A. No, sir.

Q. Did you have your men go to the jobber who made the complaint?

A. Yes, sir.

Q. And to get from him the information he had on the subject?

A. Not necessarily.

Q. Then you at least had your men report to the jobber who made the complaint about the other jobber?

A. No. They went first to the man complained of, and had a talk with him, and in most instances that man himself would be anxious to give them the facts.

Q. Well, do I understand you to say that at some time or other during the investigation your man who was making the investigation did go to see the jobber who had made the complaint?

A. They possibly did, not necessarily in every instance, however.

1069 Q. What were the reports that you got concerning the discounts allowed by the Janszen Grocery Company at Cincinnati?

A. I do not recall the exact reports.

Q. Who did the report come from?

A. The report came from our Mr. Fitzsimmons.

Q. Who was Mr. Fitzsimmons?

A. He was one of our department managers at that time.

Q. When you say he was a department manager, what duties do you mean to signify by that title?

A. Our department managers' duties at that time were to look after the selling force in a given territory.

Q. What was the territory of Mr. Fitzsimmons?

A. Mr. Fitzsimmons looked after Michigan, Ohio, Indiana, Illinois, Wisconsin, Kentucky, and Missouri.

Q. Who was his immediate superior?

A. I was his immediate superior.

Q. So there was nobody between Mr. Fitzsimmons and the vice president of the company?

A. No, sir.

Q. How many other department managers of the Lorillard Company were there in 1921?

A. Under my supervision, you mean?

Q. I mean in the selling organization.

A. There were three others under my supervision, and I think five under the supervision of Mr. Belt of the cigarette department, and two under the supervision of Mr. Hummell of the cigar and little cigar department.

Q. What was the department over which Mr. Fitzsimmons was the manager?

A. What we called the scrap department at that time.

1070 Q. And what was the scrap department?

A. The scrap department embodied our brands of scrap tobacco.

Q. Was there any other division manager who had charge of Ohio in 1921 in any department during the period that Mr. Fitzsimmons was department manager in your scrap department?

A. Yes, sir.

Q. And who were they?

A. Mr. Dandy, under my direction. Now I cannot give you those territories of Mr. Belt's and Mr. Hummell's men.

Q. So you do not know whether they were in Ohio or not?

A. He had somebody there, but who was there I do not recall.

Q. What was Mr. Dandy's position with the company in 1921?

A. Mr. Dandy was one of the managers of what we would call the plug and smoking department.

Q. Did that include cigarettes?

A. No, sir; not at that time.

Q. Mr. Dandy covered Ohio at the time that Mr. Fitzsimmons did?

A. Yes, sir.

Q. Who had charge of West Virginia—that is, for scrap tobacco—in 1921?

A. Mr. Lucius.

Q. Which of the departments of the Lorillard Company, as you define them—scrap, cigarettes, and cigar, and little cigar—was the major part of your business in 1921?

A. In Ohio?

Q. In the country?

A. Well, that would vary according to the different sections of the country.

Q. What would you say as to Ohio?

A. Mr. Fitzsimmons.

1071 Q. You said on your direct examination that you became satisfied that the Janszen Grocery Company would not continue to injure your business, and for that reason you continued selling them. How did you become satisfied that the Janszen Grocery Company would not continue to injure your business?

A. By report of Mr. Fitzsimmons, who was looking after conditions in that territory.

Q. And it was through the report of Mr. Fitzsimmons that you became satisfied that the Janszen Grocery Company would not continue to injure your business?

A. Yes, sir.

Q. And it was because of your becoming so satisfied from the report of Mr. Fitzsimmons that you gave orders to forward the shipments to the Janszen Grocery Company that had been withheld?

A. Yes, sir.

Q. What did Mr. Fitzsimmons report to you that led you to be satisfied that the Janszen Grocery Company would not continue to injure your business?

A. That would be impossible for me to tell, what he reported. I do not recall his report.

Q. How was the Janszen Grocery Company injuring your business?

A. Selling our goods at a demoralizing price that was creating the antagonism of the bulk of our distributing power in that section.

Q. Who constituted, and give us the names of the bulk of your distributing power in Cincinnati, who were offended at the discounts being allowed by the Janszen Grocery Company?

1072 A. Well, I could not tell you off-hand. I have not a list of our Cincinnati customers.

Q. Do you know J. B. Moos Company?

A. Yes, sir. That was one of them.

Q. And Henry Straus?

A. That was one of them.

Q. And did you learn that they were satisfied or discontented at the discounts that the Janszen Grocery Company was allowing?

A. They may have been mentioned, with others.

Q. At any event, you became satisfied from the report made to you by Mr. Fitzsimmons that the Janszen Grocery Company would no longer give the discounts which were not agreeable to the rest of your customers in Cincinnati?

A. Well, I would not put it that way.

Q. How would you put it?

A. Such as would no longer injure our business.

Q. And the discounts which you felt would be injuring your business would be discounts larger than the bulk of your power in Cincinnati was giving?

A. And so great—

Q. (Interposing.) Will you answer "yes"?

Mr. CALDWELL. I think he can answer it either yes or no, or modify it.

Mr. SMITH. That is all right, Mr. Examiner. Let us have the witness answer the questions.

A. Yes.

Examiner McCORKLE. You have answered it?

1073 The WITNESS. Yes.

Examiner McCORKLE. And then you can explain your answer if you want to.

The WITNESS. Repeat that question.

(The reporter thereupon read as follows:)

"Q. And the discounts which you felt would be injuring your business would be discounts larger than the bulk of your power in Cincinnati was giving?"

Mr. CALDWELL. What do you mean by "power was giving"?

A. Yes; and such discounts as in our opinion did not show the Janszen Grocery Company was improper.

By Mr. SMITH:

Q. As I understand your testimony, Mr. Ball, you were not interested at that time in particular discounts from your list price that a particular jobber would give as long as the bulk of your power, as you phrased it, would be giving the same discount in the same place?

A. That was one of the principal reasons, Mr. Smith, but when a man sells goods on a basis—

Mr. SMITH. Now will you just be good enough to answer my question?

Mr. CALDWELL. Mr. Examiner, I think in fairness that when a question has been asked and a witness is answering it, if
1074 is only fair and courteous that the witness be permitted to finish his answer, and then if there is anything in the answer that the attorney for the commission desires stricken out he should make a motion to strike it out; but to stop a witness right in the midst of his answer, when he sees the answer is adverse to what he wants, is unfair, and I ask that the attorney for the commission be cautioned not to do that again.

Mr. SMITH. Mr. Examiner, let me be understood, and it may be for the benefit of the counsel on the other side. In the first place let me suggest that this is the wrong time to characterize any answer as being adverse. I am satisfied with the answers that the witness is making, and if he desires to make any explanations he is very welcome to do it; but I think that I should object and I do object to his arguing a proposition. There is a big difference between an argument and an explanation. If he wants to explain anything, let him explain it, but if he wants to argue a proposition, I submit, I have a right to ask you to have him stop his argument.

Examiner McCORKLE. Go ahead.

Mr. SMITH. Let me have the question read.

(The reporter thereupon read as follows:)

1075 "Q. As I understand your testimony, Mr. Ball, you were not interested at that time in particular discounts from your list price that a particular jobber would get, as long at the bulk of your power, as you phrase it, would be giving the same discount in the same place?

"A. That was one of the principal reasons, Mr. Smith, but when a man sells goods on a basis——"

A. On a basis that does not show him a living profit, we feel that that eventually will cause an injury to our business.

Q. I am trying to get your policy in 1921, and I understand your policy to be this. If I state it incorrectly, correct me. You were not interested in a jobber getting the list or giving ten per cent off of list or nine per cent or eight per cent or five per cent, as long as the majority of jobbers in a given community were giving, for illustration's sake, five off of the list; you were satisfied with that, and you considered a jobber would be a demoralizer if when the majority of jobbers in his community were giving five off he would be giving six, seven, or eight. Wasn't that your attitude in 1921?

A. That was part of our attitude; yes, sir. And then, this other feature was also considered, as I brought in, in my answer.

Q. When you asked in your letters to the Janszen Grocery Company and Mr. Fennel for their cooperation, didn't you mean that you wanted them to give discounts which would not be better discounts than the discounts prevailing in Cincinnati?

A. Practically so; yes, sir.

1076 Q. So that when you became satisfied that the Janszen Grocery Company would no longer sell at a discount which would injure your business, you became satisfied, did you not, that they would give the discount which was being given by the majority of the jobbers in Cincinnati, or as you term it, "the bulk of your power"?

A. They might not give as much, but they would not give any more.

Q. But you were satisfied they would not give any more?

A. You were asking about giving the discount. They might not give as much discount, but we did not want him to give any more.

Q. But you became satisfied that the Janszen Grocery Company, from the report of Mr. Fitzsimmons, would not give a greater discount than the discount generally given by the bulk of your power in Cincinnati?

A. Yes, sir.

Q. And from being satisfied of that from the report given to you by Mr. Fitzsimmons, you directed that the shipments which had been withheld for the Janszen Grocery Company should go forward?

A. Yes, sir.

Q. What were the discounts that were being allowed by the bulk of your power in Cincinnati at the time that you became satisfied that the Janszen Grocery Company would no longer injure your business?

A. I really could not answer that question; I do not remember.

Q. Would it refresh your recollection to suggest that the discount prevailing in Cincinnati at that time was two per cent off the list to the retail trade?

1077 A. No; it would not. If I was to make a guess I think it was more than that.

Q. Would it refresh your recollection if I suggested to you that the discount allowed in Cincinnati at that time was two per cent off list to the retail trade and five and two to sub-jobbers?

A. No; it would not. I do not recall.

Q. Who made the complaint to the Lorillard Company about the discounts that were being allowed by Janszen Grocery Company?

A. Well, I do not know.

Q. Was it one of your customers in Cincinnati or in Covington?

A. Well, if it was made by a customer, the chances are it was one in Cincinnati. If it was made by one of our salesmen, it was either our head salesman there or his superior, Mr. Fitzsimmons.

Q. Do you remember whether the complaint was made to your company by Mr. Nienabor, one of your distributors at Covington, Kentucky?

A. I do not recall ever receiving a letter from Mr. Nienabor.

Q. Did you receive any letters from any other jobbers in Cincinnati or Covington, Kentucky, about the discounts being allowed by the Janszen Grocery Company?

A. Yes. I do recall a letter from the Moos Company, from Mr. Dickerson.

Q. Did you receive letters from any other company outside of the J. B. Moos Company?

A. We may have.

Q. But you do remember receiving a complaint from Mr. Dickerson of the J. B. Moos Company?

A. Yes, sir.

1078 Q. Was that complaint that you received from Mr. Dickerson the only complaint you received about the Janszen Company, or did you receive complaints also from your own men in that territory?

A. Well, we must have received complaints from our own men, or we would never held up Janszen's orders.

Q. When I speak of the word "complaint" in that question, I mean a direct complaint, similar to the one made by the J. B. Moos Company.

A. What is that?

Q. When I use the word "complaint" I mean a complaint in the first instance directly from one of your men rather than from one of

your customers. Did you get an unsolicited complaint, we will say, from any of your men about the Janszen Grocery Company?

A. Unquestionably.

Q. Do you know whether the source of information of your men regarding the Janszen Grocery Company was some of your customers in Cincinnati?

A. I do not; no, sir.

Q. As far as you know it may have been. Some of your other customers in Cincinnati may have complained to your man about the Janszen Grocery Company?

A. It may have been.

Q. You said that the Janszen Grocery Company was never cut off of your direct list, and that is correct, I suppose?

A. Yes, sir.

Q. The shipments, however, were withheld for about three or four weeks?

A. Yes, sir. I do not recall how long, but they were withheld probably that long.

1079 Q. You wrote this letter known as commission's Exhibit No. 74 to the Janszen Grocery Company, did you not [handing paper to witness]?

A. Yes, sir.

Q. And that was in reply to commission's Exhibit No. 73 [showing telegram to witness]?

A. In reply to that?

Q. I say commission's Exhibit 74 was in reply to commission's Exhibit No. 73?

A. I think it was.

Q. Which one of the circulars of your company did you say was the one that was sent to Ohio?

A. 1360.

Mr. CALDWELL. What date, please?

Mr. SMITH. This is June 29, 1921.

The WITNESS. Yes, sir.

Q. That is exhibit B, is it not?

A. It is so marked.

Q. And that is the circular which is mentioned in the letter known as Exhibit No. 74 as having been enclosed with your letter known as Exhibit 74?

A. I presume so.

Q. Did Mr. Fitzsimmons report to you on this Janszen matter orally or did he report to you by mail?

A. I think most of Mr. Fitzsimmons' reports were oral. I do not recall having gotten any letters from Mr. Fitzsimmons, because he came in every ten days or two weeks.

Q. Did he report to you in New York on the Janszen matter?

A. That is the only place he would have to report to me, because I was not leaving the office at that time.

1080 Q. What did Mr. Fitzsimmons say to you about the talk that he had with Mr. Janszen?

A. That I do not recall, Mr. Smith. He said enough to convince me that we should hold up Mr. Janszen's orders temporarily.

Q. I am speaking more particularly of the report that Mr. Fitzsimmons made to you which led you to become satisfied that he would no longer injure your business in Cincinnati. That report was made to you orally, was it not?

A. I presume so.

Q. What did Mr. Fitzsimmons tell you Mr. Janszen had said to him which led you to the conclusion that your business would no longer be injured by the Janszen Grocery Company, if you would continue shipping him?

A. I could not tell you specifically.

Q. Did he tell you that Mr. Janszen would not give a discount better than the prevailing discount in Cincinnati?

A. I could not say.

Q. You do not remember that?

A. That he used that language? As I say, I could not repeat what his conversation was.

Q. Was your attitude on the Janszen incident as you have been examined about it and cross-examined about it typical of your attitude throughout the country on similar circumstances with your trade?

Mr. CALDWELL. One moment.

A. That is a pretty broad question, Mr. Smith.

Q. I appreciate that.

A. And I could not say yes or no to that proposition. Circumstances alter the situation in many instances.

1081 Q. Were there other instances in 1921 where your attitude and your policy, and the method of carrying out your policy, was similar to that as shown in your attitude and policy with respect to the Janszen Grocery Company?

A. Yes, sir.

Q. Was that policy of yours, as exemplified with the Janszen Grocery Company, the same as the policy of your company in the Philadelphia territory in 1921?

A. No, sir.

Q. In what respects did your attitude or your policy in Philadelphia differ from your policy in Cincinnati?

A. The conditions in Philadelphia were such as to make us feel that the action in Cincinnati would not be necessary to protect our interests, in a market like Philadelphia.

Q. Why not?

A. Different conditions.

Q. What were the conditions different in Philadelphia from the conditions in Cincinnati by which you had a different policy or attitude at Philadelphia?

A. It was simply these. Through the years of operating the tobacco business in Philadelphia, the jobbers have apparently demonstrated that they can live and make a little profit on a margin so much smaller than any other market excepting New York City, that I could mention.

Q. Assuming that in Philadelphia, where the prevailing discount in 1920, a part of 1920, was eight per cent off the list, was your attitude the same in Philadelphia when the prevailing discount was, say, eight per cent off the list, as it was in Cincinnati where the prevailing discount was less than eight per cent?

A. No, sir.

1082 Q. In what respect did your policy and the attitude in Philadelphia differ from your policy and attitude in Cincinnati?

A. Well, as a matter of fact, Mr. Smith, we have always looked upon Philadelphia more or less as a hopeless cause, and we felt that to make any general effort in Philadelphia was largely a waste of time.

Q. Do you distinguish, then, between the effort you made in Philadelphia and the effort you made in Cincinnati?

A. Yes, sir.

Q. You did not make any general effort in Philadelphia such as you did in Ohio and Cincinnati?

A. No, sir.

Q. And the effort that you speak of, the efforts that you have in mind, are those by which your business would not be injured by any of your customers giving discounts higher than the prevailing discounts in Ohio?

A. That is a puzzle.

Q. Well, you spoke—

A. (Interposing.) If you can simplify that question I will try to answer it.

Q. You spoke of your efforts in Cincinnati as distinguished from your efforts in Philadelphia?

A. Yes, sir.

Q. And I was trying to define the word "effort" as you have used it in your answer, when you have used the word. When you used the word "effort," didn't you mean this, your attempt to protect your business against an injury?

A. Yes, sir.

1083 Q. (Continuing.) Which would arise where one or more of your jobbers would give higher discount than that which would be prevailing in the State of Ohio?

A. Yes, sir.

Q. That is the definition of the word "effort" as you used it in your answer?

A. Yes, sir.

Q. Then you say that your efforts were more general in Ohio than they were in Philadelphia for the reasons you have given?

A. Yes. Now I can answer that other question probably a little more intelligently. We never felt that a price condition in Philadelphia would injure us to the extent that it did in Cincinnati.

Q. Now, why did you feel that way?

A. On account of the prevailing conditions in the market for years.

Q. You said in a letter to the Janszen Grocery Company dated May 20, 1921, known as Commission's Exhibit No. 71: "There seems to be a general movement throughout the country, on the part of the jobbers—and we have recently been advised it has extended to Cincinnati—to secure a fair margin of profit for handling tobacco products." Who advised you that that movement had extended to Cincinnati?

A. I presume Mr. Fitzsimmons did.

Q. What did he say to you about the movement spreading to Cincinnati?

A. I could not recall the conversation.

Q. Did he tell you that there was going to be an association of jobbers formed in Cincinnati?

A. He may have, but I do not recollect whether he did.

Q. Your best recollection is now that he did?

A. I would not say that.

1084 Q. In any event, you had been advised?

A. Yes, sir.

Q. And you knew that there was on foot a movement by which the jobbers in Cincinnati and in that territory were going to organize?

A. No; and the reason I answered your question as I did, Mr. Smith, was because the movements were so general throughout the country in places that did not have any organization in mind at all, an organization as I recall it, was formed.

Q. What was the information which you got from Mr. Fitzsimmons when you wrote this letter?

A. That embodies about the sense of the information.

Q. You say here that you have been advised of a general movement on the part of the jobbers to secure a fair margin of profit has extended to Cincinnati. Describe, if you please, that movement which you state in this letter, known as commission's Exhibit No. 71, had extended to Cincinnati?

A. The movement was simply this: The condition had become so bad and the jobbers had become so thoroughly disgusted, that they were willing to do almost anything that they possibly could, and they went so far in many instances as to visit each other and call upon each other—the jobbers would visit among themselves, that had been enemies for years. It was a question in many of these places of life or death.

Q. Is that the movement that you meant when you used the word in this letter known as Commission's Exhibit No. 71?

A. In that letter?

Q. Yes.

A. I think it was.

Q. When you wrote this letter, or before you wrote this letter, hadn't you learned that there had been formed associations of tobacco jobbers at different other places in the United States?

A. Probably so.

Q. You knew of the Philadelphia association, of course?

A. Well, now, the Philadelphia association—I really do not recall ever having been advised that there was an association.

Q. Do you know of any other associations?

A. I probably did. If there were associations, they were probably reported from time to time.

Q. And you learned of this, I assume, through leading tobacco papers or trade journals?

A. Of course the tobacco journals frequently put notices in that regard, and our men frequently wrote in about those things.

Q. Did you know of a Chicago association at the time of writing this letter known as commission's Exhibit No. 71?

Mr. CALDWELL. Will you give us the date of that, please?

Mr. SMITH. May 20th.

A. I do not know that I knew of it at that time. I knew of it at some time.

Q. Do you want the examiner to believe that the only thing you meant by this expression "general movement throughout the 1086 country on the part of the jobbers" was jobbers visiting one another who had not been visiting one another for some time?

A. No. That was only one of the things.

Q. Now I asked you, and I will ask you again, to tell us all of the things which you meant in this expression "general movement throughout the country on the part of the jobbers to secure a fair margin of profit."

A. That movement consisted, your honor, in many instances, of jobbers acting independently, going ahead and instructing their men to sell their goods at a specified price which showed them a profit, or pass the business. I heard of numerous instances to that effect.

Q. That is not general, is it, or was it general?

A. I would say it was pretty general. There are some of the largest houses in the country who issued those instructions.

Q. Have you now told us everything that you meant by this expression "general movement"?

A. I do not know that I have. There may have been other things that came into my mind at that time that I have entirely forgotten.

Q. So that at this time the only things that you do remember that you meant by the expression "general movement to secure a fair margin of profit" consisted, first, of independent announcements by distributors, and, secondly, by visits by jobbers to some of their competitors whom they had not visited for years previously?

A. That is all that I can recall right now. Probably if I gave it more thought later I could think of something else.

1087 Q. Did you hear of any jobbers in Cincinnati who, at or about the time you wrote this letter, visited one another, who had not been visiting each other for years previous to that time?

A. Yes; I think I do.

Q. Who were they?

A. There was a fellow—I can not recall his name now—one little fellow out there said that he had gone down to see one of the jobbers that he had not seen for a couple of years.

Q. Did you characterize that to account for your statement as coming within your definition of "general movement" as you used the word in this letter known as commission's Exhibit No. 71?

A. That was one of the straws that indicated the way the wind was blowing.

Q. There were not any houses in Cincinnati who issued announcements to the trade regarding the discount stand about May, 1921, were there, that you know of?

A. I do not recall any at that particular place, although I may have been informed that there was.

Q. Yes; but you said in your letter that there was a general movement which you had recently been advised had extended to Cincinnati, and you say now that the only thing you had in mind, as far as the movement spreading to Cincinnati was concerned, was that one little jobber had visited another jobber. Do you want the commission to understand you to mean that was the thought that you wanted to convey in your letter to the Janssen Grocery Company?

A. I think in my previous testimony, Mr. Smith, I have
1088 informed you that Mr. Fitzsimmons was on the ground and was constantly reporting conditions out there, and a large part of our information comes from our men in the field.

Q. You depend on your men in the field for information, of course?

A. Certainly.

Q. And when you used the word "movement" in this letter as having extended to Cincinnati, you had in mind the information that had been given to you by Mr. Fitzsimmons?

A. Partly by Mr. Fitzsimmons; yes, sir.

Q. Well, now you say partly by Mr. Fitzsimmons. That leads me to ask you where the other part of your information came from?

A. Where? What was that question?

EXAMINER MCCORMICK. Where the other part of your information came from.

THE WITNESS. The other part of the information—this one particular jobber I referred to told me of this visit at the time I was there November 18th.

Q. That was in 1920?

A. Yes.

Q. I am speaking of May, 1921.

A. Yes; no; it was in November, 1920.

Q. I am speaking here of a letter dated May 20, 1921, which you wrote to the Janszen Grocery Company, in which you say that you have recently been advised that this movement was extended to Cincinnati?

A. Yes.

Q. Now I ask you if the information you got on that subject 1089 was not the information that you got from Mr. Fitzsimmons?

A. A great deal of it unquestionably was.

Q. Now I want to ask you again where the rest of that information came from?

A. Well, the information—the example I gave you of the jobber's visit was an occurrence I remember when I was in Cincinnati in November.

Q. But that was in November, and this letter is dated in May, 1921?

A. Yes.

Q. And you used the words here you have been "recently advised."

A. I did not mean to infer in my letter that just prior to this letter this particular man visited this jobber that he had not visited for two years.

Q. When you used the word "recently" here you meant the word to go as far back as November, 1920?

A. No; I did not.

Q. Then I will ask you again—

A. (Interposing.) Although these movements started away back in 1920.

Q. I will ask you again where you got the information which led you to state in your letter to the Janszen Grocery Company "We have recently been advised it," meaning the movement, "has extended to Cincinnati." You said that you got the information from Mr. Fitzsimmons?

A. The greater part of it.

Q. The greater part of it, as you have testified. Now I am asking you again where the other part of that information came from?

A. I do not recall the source of the other information.

1090 Q. This letter, known as Exhibit No. 71, is a form letter, is it not?

Mr. CALDWELL. It is a copy of a form letter.

A. I do not think I ever had that letter in that form. I wrote a great many other letters similar to that.

Q. You wrote an exactly similar letter to Mr. Fennell, did you not?

A. Yes. I wrote those on the same day, I think. Aren't they dated the same?

Q. Yes.

A. Yes.

Q. You did not write to anybody but Mr. Fennell and the Janszen Grocery Company any letter similar in substance to commission's Exhibit No. 71 at or about that time, did you?

A. I can not recall that I wrote more, or that I did not write any.

Q. What was your reason for selecting Mr. Fennell and the Janszen Grocery Company?

A. The reasons for selecting them was due to the information I had at that time.

Q. And what was the information you had at that time regarding Mr. Fennell and the Janszen Grocery Company?

A. Well, I could not give you the specific information I had at that time.

Q. Well, let us have it in a general way, if you please.

A. In a general way it was that these parties were probably not inclined to assist in this movement or to go into it.

1091 Q. And you wrote to them, asking them, as your letter states, to co-operate with the movement on your line of merchandise?

A. Yes, sir.

Q. When you stated that they had not shown a willingness, didn't you mean to say that they had been giving discounts on your goods at Cincinnati and in the territory which they served which were larger than some of the discounts given by some of your other customers?

A. That was embodied in this general statement.

Q. That is what you meant?

A. But this thing was broader than that, you know.

Q. But you meant to embody in your general statement the idea that Mr. Fennell and the Janszen Grocery Company were giving discounts which were greater than some of your other customers were giving in May, 1921?

A. Yes, sir.

Q. You endeavored, Mr. Ball, on your direct examination, to define a price cutter, that is, as far as the Lorillard Company was concerned, and you were discussing the relation of the discounts allowed by the so-called price cutter and the 10 and 2 allowed by your company. You did not mean to say, did you, or to have the commission believe, that you considered that your customers who gave 2 per cent off of your list price were price cutters?

A. In what market?

Q. In any market.

A. Well, there are some markets where there is very little tobacco sold at less than list price.

Q. Where are those markets?

A. West Virginia is one of them.

1092 Q. So that you would consider that your customers in West Virginia who sold at better than list prices, are price cutters?

A. Well, that question of price cutting and price cutters is such a vague proposition, and it has so many ramifications to it, that to give any general answer to any specific case—

Q. (Interposing.) We appreciate that.

A. Wait a minute. Let me give you an example. Take the city of Charleston, which is one of the most important centers in West Virginia. I think the jobbers in the city of Charleston pretty generally—say, generally in fact, adhere to list prices—that is, 2 per cent off for cash. If anyone sells for less than that, that would be considered a cut price.

Q. That is because jobbers generally there get list prices?

A. The conditions in a given territory largely regulate our opinion of the price.

Q. You would consider anybody who gave a better than 2 off list price in Charleston as a price cutter?

A. Yes; at that time.

Q. Where, as in Cincinnati, the jobbers were giving 2 per cent off of list to the retail trade, you would there consider anyone who gave a higher discount than that as a price cutter?

A. In Cincinnati?

Q. Yes.

A. Oh, no. There are lots of discounts greater than 2 per cent.

Q. Two per cent to the retail trade in Cincinnati was the discount allowed to the retail trade in June and up to the first of August or to the last of August, 1921?

A. It was.

1063 Q. Yes.

A. Well, I would say—

Mr. CALDWELL (interposing). May it please the court, I take an exception to that, because my recollection is that there were any number of jobbers in Cincinnati—

Examiner MCCORKLE (interposing). There was testimony to that effect.

Mr. CALDWELL. One moment. Just let me finish. I will finish in a sentence: Who did not observe that two per cent proposition. So that it is not correct, the quotation that is made.

Examiner MCCORKLE. I will just state that there is testimony to that effect. Proceed with your examination. There is testimony to that effect; I do not say how much, but there is testimony to the effect that that discount rate was in effect at that time. There is testimony to the effect that during a certain time that discount prevailed.

A. Not my testimony, however.

Mr. SMITH. Oh, no. We can get around the difficulty.

Q. Assuming that in July and August, 1921, the prevailing discount in Cincinnati to the retail trade was two per cent off list, would the Lorillard Company look upon any of its customers who were giving better than that discount as price cutters in that territory?

1064 A. With our knowledge of Cincinnati, we would not.

Q. I was assuming——

A. (Interposing.) I say—we say with our knowledge of that market we would not.

Q. Assuming that in Cincinnati the bulk of your power was giving to sub-jobbers a discount of 5 and 2, would you have considered any of your customers who were giving a discount to that trade of better than 5 and 2 price cutters?

A. To the sub-jobbers?

Q. Yes.

A. I do not hardly think I would in Cincinnati.

Q. Did you consider the Janszen Grocery Company a price cutter?

A. We considered that it would be injurious to ship them any longer, or we would not have withheld their orders.

Q. That is only another way of saying that you considered them a price cutter, isn't it?

A. Well, one is the result, and that is the main thing that we are interested in, and practically the only thing we are interested in, and I tried to define in my general statement how we considered it an injury to our business and why.

Q. You consider a price cutter an injury to your business?

A. A price cutter?

Q. Yes.

A. I cannot answer that question.

Q. Except as you have answered it?

A. It has been worked out of me in such a way that I have not known that I have answered it. I will tell you that.

Q. As you say, you are looking more to the benefit and the injury to your business than anything else?

1095 A. Yes. We are looking first for the Lorillard Company, and we are looking about 99 per cent of the time for the Lorillard Company.

Q. And it is the injury to your business that does concern you very greatly?

A. Yes, sir.

Q. And when your jobber customers, or, as you said, the bulk of your power, becomes disinterested in your products, then you consider that you are injured?

A. Yes, sir; probably not at that time, but we will be if that thing continues.

Q. And you are interested in stopping the continuance of it?

A. Yes, sir.

Q. And it is so, I think you have repeated that the bulk of your power becomes uninterested or disinterested in your products when someone or some of your customers in the territory which the bulk of your power serves gives a higher discount than they think—that is, the bulk of your power thinks—ought to be given?

A. And prevents them from making a living profit.

Q. Well, will you say "yes" to my question, without the addition you have made?

A. Yes, Mr. Smith. I do not mean to answer that question "yes." "Yes" may mean a great many things, and I think an explanation by me, as in this instance, may be necessary, and I am just trying, your honor, to give the facts as I see them, as nearly as possible.

Q. When you speak of a living profit do you speak of a living profit for the Lorillard Company or for the customer?

A. A living profit for the customer.

1096 Q. I do not suppose you determine that. You let the customer do that?

A. Yes; but we know what it costs the customer to do business.

Q. But I say you let the customer determine that for himself—what he considers to be a living profit?

A. Now that answer is misleading.

Mr. CALDWELL. Do you want to explain that answer, Mr. Ball? We want to get at the facts here. Mr. Smith does the same as I, and if there is any answer by you that is misleading, explain it at the time.

Mr. SMITH. Let me repeat again, Mr. Examiner, and I want this on the record, I do not have any objection to the witness explaining any answer, but I do object, I repeat, to the witness arguing an answer or arguing the merits of the question, or arguing the merits of a question and answer.

Examiner MCCORKLE. The witness has been told that two or three times. He ought to try and observe if he does not.

The WITNESS. I am trying my best.

Mr. CALDWELL. It is merely a difference of opinion as to whether Mr. Smith thinks it is an argument or the witness thinks it is an argument.

Examiner MCCORKLE. Do you think your last answer needs an explanation?

The WITNESS. Yes, sir.

1097 Examiner CALDWELL. Go ahead and explain it.

The WITNESS. Repeat the question.

(The reporter thereupon repeated the pending question as follows:)

"Q. But I say you let the customer determine that for himself—what he considers to be a living profit?"

"A. Yes; but we know what it costs the customer to do business."

A. Yes; when that living profit is anywhere near what we think is reasonable for the cost of handling this class of merchandise.

By Mr. SMITH:

Q. As long as a jobber is satisfied with the profit he makes the Lorillard Company is satisfied, isn't it?

A. Have you ever known a jobber to be satisfied?

Q. Will you please answer my question?

A. What is the question?

Mr. CALDWELL. I object to that, on the ground that it is assuming a state of facts not proven.

Examiner McCORKLE. Read the question.

(The reporter read the pending question, as follows:)

"Q. As long as a jobber is satisfied with the profit he makes, the Lorillard Company is satisfied, isn't it?"

A. The jobber is never satisfied with the profit he makes.

1098 Q. Do you want us to understand that the Lorillard Company is never satisfied with the profit the jobber makes?

A. No.

Q. How do you reconcile your proposition that as long as the jobber makes a profit which is satisfactory to him, and as long as you feel that the profit is satisfactory to you, you are satisfied with the sale at that rate of discount?

Mr. CALDWELL. One moment. I understood him to say as long as the jobber makes a living profit, not as long as the jobber makes a satisfactory profit—that is what I understood the witness to testify to.

Examiner McCORKLE. Proceed and answer the question.

The WITNESS. What is the question?

(The reporter thereupon read as follows:)

"Q. How do you reconcile your proposition that as long as the jobber makes a profit which is satisfactory to him, and as long as you feel that the profit is satisfactory to you, you are satisfied with the sale at that rate of discount?"

A. That is a very puzzling question.

Q. I do not think it needs any explanation. I am asking him to explain it. Let him explain it. That is the sense of that question.

Mr. CALDWELL. Do you understand the question?

1099 The WITNESS. No. Read it over again and maybe I can get it through my head.

(The reporter thereupon read the question again.)

Mr. CALDWELL. I submit that the question is certainly difficult.

Examiner McCORKLE. Mr. Caldwell, this is an intelligent witness, and if he is not satisfied with it and does not understand it—and he is trying to understand it now—I do not think you ought to interfere with the examination.

The WITNESS. I do not admit that the jobber is satisfied with his profit. By satisfactory profit I mean what we consider a living profit over and above the cost of doing business to the jobber.

By Mr. SMITH:

Q. What do you consider a living profit?

A. That is based on different territories and different conditions.

Q. In other words, a living profit—

A. (Interposing.) In Philadelphia would be a loss to a man doing business in West Virginia.

Q. Now let me finish my questions. A living profit might be in some territories 5 per cent discount off list, whereas in other cases and in other territories it might be 7 per cent off list, and in other cases list less 2 per cent?

A. Yes.

Q. And it varies throughout the country?

A. Yes.

1100 Q. Well, isn't it true that one jobber can make a higher profit or a better profit giving the same discount than another jobber can make at the same discount?

A. Yes, sir.

Q. How does the Lorillard Company and do you figure what is a living profit in one particular territory or at any particular place?

A. That is based on the kind of business the jobber is doing. If a jobber is doing what we call a counter business, as is done in many instances in Philadelphia and New York City, and has not anybody out to solicit orders or no delivery wagons or automobiles to deliver goods, he naturally can do business on a smaller margin of profit.

Q. And what is the margin of profit?

Mr. CALDWELL. Excuse me. Let him finish his answer.

A. (Continuing.) Than the larger jobber.

Q. What is the margin of profit the counter jobber in New York City can do business on?

A. The smallest margin that the counter jobber does business on in New York City is about 2 per cent.

Q. What do you say is the margin of profit that the merchant in Cincinnati can do business on?

A. There are very few of those kind of jobbers in Cincinnati.

Q. You are speaking of counter jobbers?

A. Yes.

Q. I am speaking, because I understand there are no counter
1101 jobbers in Cincinnati, of the hauling jobber, if that is the way you describe him, the distributing jobber; what margin of profit do you say he ought to secure on your goods in Cincinnati?

A. I do not believe a real jobber with all the expenses incident to a well-organized jobbing concern, can make any money in Cincinnati on a smaller margin of profit than 7 or 8 per cent.

Q. That is, he ought to charge list less 2 per cent or three per cent, with the additional 2 off for cash?

A. Yes, sir.

Q. That you admit would vary with the cost of the particular jobbers doing business?

A. Yes, sir; to some extent.

Q. Some might be able to make a living profit giving his customer a better discount than two or three and an additional two off?

A. Very few of them.

Q. There are some of them you think, however, who might?

A. I said very few of them to my knowledge, in Cincinnati.

Q. Do you know what discounts were being allowed the tobacco jobbing trade in Cincinnati prior to 1921?

A. Being allowed by the Cincinnati jobbers, you say?

Q. Yes.

A. No, sir.

Q. Would you be surprised to know that the Cincinnati jobbers were allowing to the retail trade prior to May, 1921 as much as ten per cent off list and making a good living?

A. In some instances, but I think, Mr. Smith, you are taking individual instances that you have heard of. A jobber may be selling some given retail dealer at ten off, but he is not selling
1102 all of his customers at ten off. He is probably selling some customers at list price, and they average up. That is the cause of many confusions in this matter, I think. You have one instance, and you base the whole on that one individual.

Mr. SMITH. Do you want to make any further argument on that question?

Mr. CALDWELL. I object to that statement.

The WITNESS. It was not an argument, Mr. Smith, that I could see.

Mr. CALDWELL. May it please the examiner, I think that Mr. Smith himself ought to be cautioned that it is not fair and it is not right to characterize this witness' answers as an argument of that kind, when he is trying as best as he can to give the correct information as to facts, and I ask that the examiner here and now caution Mr. Smith against those remarks.

Mr. SMITH. I do not need to be cautioned, Mr. Examiner.

(Further argument followed, which by direction of the examiner was not recorded.)

Examiner MCCORMICK. I think that while the witness has not intentionally argued the matter, still I think that he has gone further along that line than he should have as a witness, of
1103 course, unintentionally Mr. Smith is calling his attention to it, and I do not think that is improper.

Mr. CALDWELL. I take an exception.

The WITNESS. Would you characterize that last answer I made as an argument or a statement, your honor?

Examiner MCCORMICK. It appeared to me to be somewhat more lengthy than it might have been.

The WITNESS. The explanation is more lengthy?

Examiner MCCORMICK. Yes. Proceed with your questions, now, gentlemen.

By Mr. SMITH:

Q. Do you know that some jobbers were giving to some of their customers prior to May, 1921, a discount of ten per cent off of list price for your products?

A. I do not know it, but I have not any doubt that in some instances they did.

Q. Do you know that in 1920 some of your jobber customers in Cincinnati were giving ten per cent off of your list price for some of your products?

A. I do not know, but I have not a doubt that it was done in some instances.

Q. And don't you know and has it not been reported to you that in 1919 and 1918 and in 1917 some of your customers in Cincinnati and in Kentucky were giving as much as 7, 8, 9, and 10 per cent discount off of the list prices of your products and making a living?

A. I do not know, but I question that very much, for it is not likely that a man will give away a great big portion—

Mr. SMITH (interposing). Now I object.

Examiner McCORKLE. Now, you are arguing. That is a great deal along the line of argument now.

The WITNESS. I do not know, but I doubt it very much.

Q. Has it been reported to you that in Cincinnati, prior to May, 1921, your jobber customers were giving as much as 6, 7, 8, 9, and 10 per cent discount off of your list prices to some of their customers?

A. I do not know, and it has not been reported to me as far as I know.

Q. What reports did you get as to the discounts that were being allowed by your customers in Cincinnati prior to May, 1921?

Mr. CALDWELL. How far prior, Mr. Smith?

Mr. SMITH. Well, we will take it a week prior to May, 1921.

A. During 1920, particularly the latter part of the year, we had reports come in from our men that discounts ranging as high as ten per cent were given.

1105 By Mr. CALDWELL:

Q. Mr. Ball, he is asking about 1921. Can you answer that?

A. The same condition prevailed in 1921.

Q. That is what he wanted—1921.

A. Prior to 1920 the condition was very different. He referred to 1917, 1918, and 1919, and that is the reason I mention this.

By Mr. SMITH:

Q. When you wrote these letters to Mr. Fennell and to the Janszen Grocery Company in May, 1921, known as commission's Exhibits 70 and 71, respectively, you knew, as a matter of fact, did you not, that Mr. Fennell and the Janszen Grocery Company were giving pretty large discount off of your list prices for your products to their customers?

A. That was the report; yes, sir.

Q. What did you learn they had been giving?

A. I can not recall any specific amounts.

Q. What was the highest rate of discount you heard that they or either of them had been giving?

A. I can not recall any specific discount.

Q. But you have a general recollection that they were giving a large discount?

A. Yes, sir.

Q. And you mean, I assume, from reading your letter to Mr. Fennell, known as commission's Exhibit No. 70, that Mr. Fennell
1106 was giving in your opinion an excessive proportion of his ten per cent to his trade?

A. Yes, sir.

Q. And you are unable now to tell us from your recollection what that excess in proportion of the 10 per cent Mr. Fennell and Mr. Janszen were giving to their trade?

A. I am; yes, sir.

Q. Although you say that you do not recollect writing similar letters to anybody other than these two firms?

A. I do not, although I may have.

Q. The Janszen Grocery Company was a prosperous concern in 1921 at the time you wrote them, was it not?

A. I think so.

Q. Mr. Fennell was doing a thriving business in May, 1921, when you wrote him commission's Exhibit No. 70?

A. Mr. Fennell, Mr. Smith, was added to our list, I think, only in 1920. At the time he was added to our list his credit list was very great, as the amount of money reported to us by him and by agencies was very great.

Q. You continued him, however, on your list of buyers?

A. Yes, sir.

Q. You were not afraid of Mr. Fennell's credit in 1921, were you?

A. He was a man, from the amount of capital invested, that we would naturally have to watch.

Q. He was doing a big business, however?

A. No; Mr. Fennell has never done a big business.

Q. That is, in comparison with some of your other customers?

1107 A. No; I believe Mr. Fennell is one of the smallest customers we have got there.

Q. He handles all of his own stuff and works himself in his place of business; is that correct?

A. I believe he does a great deal of the work himself.

Q. But do you know that his business has grown since the time you put him on your direct list?

A. I do not, no; but I imagine it has.

Q. How long had you found out that Mr. Fennell and the Janszen Grocery Company had been giving these large discounts?

A. Repeat that, please sir.

Mr. CALDWELL. How long before when?

(The reporter repeated the question as above recorded.)

Mr. SMITH. How long before May, 1921, when this letter was written?

A. The fall of 1920.

Q. And that condition prevailed from the fall of 1920 up until the time you wrote the letter, at least?

A. I rather think it did.

Q. How long had the Janszen Grocery Company been on your direct list prior to May, 1921?

A. I cannot answer that specifically, but I assume for some time.

Q. By "sometime" you mean a number of years?

A. Yes, sir.

Q. How long prior to May, 1921, had the Janszen Grocery Company, according to the information that you got, been giving what you termed an excessive proportion of their 10 per cent discount away to their trade?

A. I could not state specifically, but I do not imagine this condition started until about September, 1920, because the general condition in Cincinnati and pretty generally over the country was quite satisfactory up to that time.

Q. When did you say in 1920?

A. September, about that.

Q. That the large discounts began to be given by jobbers?

A. Yes, sir.

Q. Do you know whether any of your customers at Cincinnati were giving as great a discount as the Janszen Grocery Company and Mr. Fennell at the time you wrote to Mr. Fennell and to the Janszen Grocery Company?

A. At the time of this letter?

Q. Yes.

A. I imagine that it was general, and that was the movement that they wanted to correct, to which I referred in that letter.

Q. You do not refer in this letter to any movement.

A. No; that was a subsequent letter, I believe.

Q. The movement you refer to in this letter is the movement by which jobbers were to secure a fair margin of profit for handling tobacco products. That is the movement you refer to in this letter, known as commission's Exhibit No. 71?

A. Yes, sir.

Q. Would you be surprised to learn that the Janszen Grocery Company had been giving as much as 5, 6, 7, 8, 9, and 10 per cent discount off of your list prices during 1917 and up to 1921?

A. Yes, sir.

Q. You never heard of that, or did you hear of the discounts they were giving?

A. I did not hear. We heard nothing of discounts up until about December of 1920.

Q. So that, as far as you know, the Janszen Company and other of your Cincinnati customers may have been giving large discounts—5, 6, 7, 8, 9, and 10—prior to September of 1920?

A. In specific instances to a few individuals. That most probably was the case.

Q. And just how many of those customers of yours were giving these great discounts you do not know?

A. Just how many?

Q. Yes.

A. I do not know of any.

Q. But you say there may have been?

A. There may have been.

Q. As far as you know?

A. Yes, sir.

Examiner McCORKLE. Gentlemen, we will adjourn until to-morrow at half past nine.

(Whereupon, at 4.40 p. m. an adjournment was taken until to-morrow, Friday, December 15, 1922, at 9.30 a. m.)

1110

FRIDAY, DECEMBER 15, 1922, 9.30 a. m.

Met pursuant to adjournment.

Before Mr. George McCorkle, examiner.

Appearances: Mr. Edward L. Smith and Mr. Edwin B. Haas, (Washington, D. C.) appearing for the Federal Trade Commission; Mr. Charles Caldwell (233 Broadway, New York) appearing for the P. Lorillard Company; Mr. Charles S. Moore (Woodward Building, Washington, D. C.) appearing for Cincinnati and Covington tobacco jobbers, excepting the Janszen Grocery Company.

PROCEEDINGS

DAVID H. BALL was recalled as a witness, and having been previously sworn, testified as follows:

Cross-examination (continued) by Mr. SMITH:

Q. Mr. Ball, who were the price cutters to whom the Lorillard Company sold in Cincinnati between the first of June and the first of August, 1921?

1111 A. I could not answer that specifically.

Q. Answer it generally?

A. Do you mean who were selling goods at less than list price? If by price cutting you mean selling goods at list price, I presume a great many of the jobbers on occasions were doing it.

By Mr. CALDWELL:

Q. Mr. Ball, you say "if by price cutting you mean selling goods at list price."

A. If by price cutting Mr. Smith means that. He asked me that question.

By Mr. SMITH:

Q. You say that you sold practically all of the jobbers in Cincinnati who might have been giving only 2 per cent off the list price. Is that what you mean to say?

A. It is impossible for me to commit myself on any specific basis as far back as that. I have only been trying to give you a general outline, and I explained the fact that I could not give you specific answers to those specific things.

Q. You said on your direct examination that you sold price cutters in 1921 after you learned of the formation of this association of Cincinnati tobacco jobbers. I am asking you who those price cutters were that you sold to?

A. I can not answer that question.

Q. When you said you sold to price cutters in Cincinnati in 1921 after the association was formed, what did you mean by price cutters?

1112 Mr. CALDWELL. I object to the question on the ground that the witness has not stated anything about when any association in Cincinnati was formed, or after the formation of any association in Cincinnati.

By Mr. SMITH:

Q. I will meet that objection. You remember, do you not, Mr. Ball, testifying in response to a question of Mr. Caldwell's that the Lorillard Company sold price cutters in Philadelphia and in Cincinnati in 1920 and in 1921. Do you remember of so testifying?

A. The sense of that; yes.

Q. Did you mean that your answer should apply to all of 1921 as to Cincinnati and to all of 1921 as to Philadelphia, or either of them?

A. We made no changes in the sales to our jobbers in that period other than to one concern.

Q. You probably do not understand the question. Do you mean your answer to apply to your continuing to sell the price cutters in Philadelphia and in Cincinnati in 1920 and in 1921? Did you mean your answer to apply to all of the year 1921 as to Cincinnati?

A. Excepting those that we discontinued selling.

Q. So that you did discontinue selling to price cutters in Cincinnati in 1921?

A. We discontinued selling to those that we thought were injuring our business.

1113 Q. Those were price cutters, weren't they?

A. Yes, they were price cutters; but there were other price cutters, too, that were not injuring our business.

Q. I will ask you the question whether as a matter of fact you did not discontinue selling to price cutters in Cincinnati in 1921?

A. We discontinued selling only such as we felt were injuring our business.

Q. That is only another way of saying that you discontinued selling to price cutters, isn't it?

A. You may think so, but I do not think so.

Q. I am asking you.

A. I do not think so.

Q. You discontinued selling to the Janszen Grocery Company?

A. We had but one object in view—

Q. Will you answer my question, please? You discontinued selling to the Janszen Grocery Company because the Janszen Grocery Com-

pany was giving higher discounts than your other customers in Cincinnati were giving, didn't you?

A. Not because of that reason; no.

Q. Didn't you testify that was the reason for your discontinuing selling to the Janszen Grocery Company?

A. We never discontinued selling them. We only held up their orders for a short period.

Q. Were not the orders of the Janszen Grocery Company held up for giving greater discounts to the trade than some of your other customers were giving?

A. Because we thought their method of operating was injurious to our business.

1114 Q. Was not their method of operating that you thought injurious to your business the method of giving higher discounts than your other customers there gave? That was the system they were using that you thought was inimical to your business?

A. Yes.

Q. Is not that another way of saying that you suspended and withheld shipments to the Janszen Grocery Company because they were price cutters?

A. No.

Q. All right. Now, what other customers of yours did you discontinue shipping in Cincinnati in 1921?

A. We discontinued shipping to Voss Grocery Company. That was in 1921.

Q. In what part of 1921 was that?

A. I don't know.

Q. Did you resume selling to them?

A. No.

Q. You have not sold to them up to this time, have you?

A. No, sir.

Q. Were they price cutters?

A. They were demoralizers and injuring our business.

Q. When you say they were demoralizers and injuring your business don't you mean to say that they were giving discounts to the trade greater than some of your other customers were giving to the trade?

A. I mean to say that the prices that they quoted in their published list were such as we felt were a serious injury.

Q. And you felt it was a serious injury to you because those discounts were greater than the discounts being allowed by some of your other customers, and made them dissatisfied in handling your products. Is that right?

A. Yes.

1115 Q. Won't you say then that you discontinued the Voss Grocery Company because of the discounts they were giving?

Mr. CALDWELL. I object to that—

Mr. SMITH. Do not interfere with me.

Mr. CALDWELL. I want to put my objection on the record. I object to the repetition of this question on the ground that it has been answered over and over again.

Examiner MCCORKLE. Proceed.

Mr. CALDWELL. Exception.

A. No, sir; I won't.

Q. You persist in your answer that the reason you cut them off or the reason you discontinued selling the Voss Grocery Company was that they were giving discounts which in your opinion were injuring your business?

A. I persist in my answer that we discontinued selling the Voss and other people only for the reason that we felt that it was an injury to our business.

Q. And the injury to your business arose from the discounts that you believed they were allowing to their trade?

A. That was the principal reason. I have answered that a dozen times.

Q. Maybe you will have to answer it a whole lot more times. And the injury to the P. Lorillard Company arose from the fact that the discounts they were giving disturbed the attitude of your other customers, to your company?

A. To our big distributing power, yes.

1116 Q. As you term the bulk of your distributing power in Cincinnati?

A. Yes.

Q. What other price cutters did you discontinue selling to, or what other price cutters' shipments were withheld by you in 1921 in Cincinnati?

A. I don't recall any others that we discontinued whom we considered injuring our business.

Q. Were there any whose shipments were withheld or suspended?

A. I don't recall any.

Q. Do you mean that there may have been others that you do not now recall?

A. Yes.

Q. Were there any of your jobbers in Cincinnati in 1921 other than the Janszen Grocery Company and the Voss Grocery Company who were selling at discounts that you considered injurious to your company, that you continued selling to?

A. Not to my knowledge. We would have discontinued selling them if we thought they were injuring our business.

Q. The question of injury to your business would arise from the discounts your customers might be giving, which discounts might disturb the bulk of your distributing power in Cincinnati?

A. And cause demoralization that was injurious.

Q. Did Mr. Fitzsimmons ever report to you that there was an association of jobbers in Cincinnati in 1921?

A. He probably did, but I have no recollection of any specific report of any association.

Q. Did you know, however, that there was an association?

A. Yes.

1117 Q. When did you first get that information?

A. I don't know.

Q. Was it at or about the time the association was organized?

A. I really don't know. I don't know when the association was organized.

Q. Did you learn the discounts that were being allowed by the bulk of your distributing power in Cincinnati at the time of the organization of this association?

A. I probably did, but I do not recall what they were.

Q. And did you look upon that discount as the customary and prevailing discount in Cincinnati?

A. To which discount do you refer?

Q. The discount allowed by the bulk of your distributing power.

A. Yes.

Q. You considered that to be the customary discount in Cincinnati?

A. Yes.

Q. And would you also say that you considered that any of your customers who gave discounts better than that which was the customary or prevailing discount in Cincinnati would be injuring your business in the manner you have described?

A. A great many things entered into the question of discounts, Mr. Smith, how they were given, in what manner they were given, and the extent of the demoralization which brought about the injury referred to.

Q. In 1921 when you learned of the prevailing and customary discount in Cincinnati did you consider that any of your customers who gave higher discounts than the prevailing and customary
1118 discounts given by your bulk of distributing power would be injuring your company?

A. It would depend upon how they gave it.

Q. What do you mean by that expression?

A. If it was given in such a way, as by being advertised broadcast, that went not only to Cincinnati but outside of Cincinnati, and brought about a demoralized situation in that territory or outside, we figured that it would be an injury.

Q. Did you mean to distinguish in your answer between a secret discount which might be better than the prevailing discount and an open discount?

A. As I have said a dozen times, Mr. Smith, we were not interested so much in the discounts that were given. It was in the demoralization bringing about the injury to which we referred.

Q. In other words, if the discounts that might be allowed by any particular customer of yours in Cincinnati would not arouse complaints of your other customers, you paid no attention to those discounts, but if, on the other hand, your customers complained about the discount that somebody was giving in Cincinnati or about

the discounts that some of your Cincinnati jobbers might be giving at some other place, those you would be interested in, and you would be considering those as injuring your business?

A. We did not consider complaints vital. Antagonisms are what we considered would be injurious.

Q. Let me put it in another form then. If the discounts
1119 given by your jobbers in Cincinnati to the Cincinnati trade or to the outside trade, that is beyond Cincinnati, aroused the antagonism of your customers, those were the discounts that you considered to be injurious to your company?

A. If they aroused the antagonism of the greatest part of our distributing power.

Q. The greatest part of your distributing power in Cincinnati belongs to the association of tobacco jobbers there, does it not?

Mr. CALDWELL. I object to that.

A. I do not know who belonged to the association at that time. I did not inquire and I do not know to-day.

Examiner McCORKLE. What do you wish to object to?

Mr. CALDWELL. I wish to object to the fact that the question imported that he knew who the members of the association were, when there was no such testimony.

By Mr. SMITH:

Q. Whom do you consider and whom did you consider in 1921, in the period from June 1 to September 1 of that year, to constitute the bulk of your power in Cincinnati?

A. In order to answer that question intelligently I would have to look up the purchases of the various jobbers.

1120 Q. Who are your most important jobbers in Cincinnati whom you would not want to antagonize by continuing to sell to another jobber provided that other jobber gave higher discounts than the bulk of your power?

A. The wholesale grocers as a body, and the only others that I can recall as being big factors are the Moos Company and Straus.

Q. That is Henry Straus?

A. Yes.

Q. The J. B. Moos Company is one of the largest tobacco jobbers in the Middle West, is it not?

A. Its various branches.

Q. It has branches scattered throughout the Middle West, hasn't it?

A. In the State of Ohio and I believe they have a branch in Indianapolis, too.

Q. Do you know whether they have branches in other places?

A. No, sir.

Q. Henry Straus is also a very large jobber? Is not that firm a very large jobber?

A. On some lines.

Q. What do you mean by some lines? On what lines are they large jobbers?

A. They are larger in proportion on cigarettes than on tobaccos.

Q. Henry Straus operates a great number of retail cigar and cigarette and tobacco stores in Cincinnati and throughout Ohio, does he not?

A. Four or five, I believe.

Q. Do you think four or five would constitute the entire number of retail shops that Straus operates?

A. As far as I know.

Q. As a matter of fact, does not Henry Straus have retail 1121 stands in practically all the hotels in Cincinnati?

A. I don't know if he has.

Q. Doesn't he have in the neighborhood of 30 or 35 retail stores scattered throughout Cincinnati?

A. I would be very much surprised to learn that he had that many.

Q. What did you say you thought about the number of retail shops owned or conducted by Henry Straus in Cincinnati?

A. Four or five.

Q. Who were the price cutters that you continued selling to, and whose shipments were not suspended or withheld in 1920 or 1921, that is among your Philadelphia jobbers?

A. The only one that I recall that was selling goods to the injury of our business and whom we discontinued was Seider.

Q. You would class Seider, then, as a price cutter, would you?

A. I would class Seider at that time, the way he was operating, as a big detriment to our business.

Q. Would you consider him a price cutter? You used the word "price cutter" on your direct examination and said you continued to sell to price cutters in Cincinnati and in Philadelphia in 1920 and in 1921. Now, I ask you whether Seider Brothers came within your definition of a price cutter?

A. Did I not supplement that explanation of a price cutter as being a very vague reference?

Q. I don't know and I don't care, Mr. Ball. I am trying to find out whether Seider came within your definition of a price cutter, as you used the term in your direct examination.

1122 A. The term price cutter does not interest us a particle and has not. The only point of interest that we had was when it got to the point that we felt it was an injury to the business.

Q. And then you considered the customer a price cutter?

A. Then we considered him an injury to our business.

Q. What did you mean before on your direct examination—

A. Just what I said.

Q. What did you mean on your direct examination when you said you continued to sell to price cutters in Cincinnati in 1920 and 1921?

A. I mean that strictly speaking everybody in the city of Philadelphia was selling goods at less than our list price.

Q. That is how you used the word price cutter, is it?

A. If I used it that is what I meant.

Q. So that when you said you continued selling to price cutters in Philadelphia and in Cincinnati in 1920 and 1921 you meant that you continued selling to some of your customers who did not get the list prices for your products?

A. Yes.

Q. That is what you meant, and you meant only that, of course?

A. That is what I meant.

Q. But Seider you considered to be, to use your own expression, the only demoralizer in Philadelphia in 1921, and the Janszen Grocery Company and the Voss Grocery Company in Cincinnati and Seider in Philadelphia were the only three customers of yours in both of those places that you considered to be demoralizers in 1921?

A. To the extent that we considered our business was injured.

1123 Q. And to all of those three you discontinued shipments?

A. To Janszen only temporarily.

Q. Did you resume selling to Seider in 1921?

A. I don't recall whether it was 1921 or 1922. We have resumed selling.

Q. But you have not resumed selling the Voss Grocery Company since the time you started discontinuing them in 1921?

A. No, sir.

Q. When these reports came to you from your customers or from your own men who were travelling in the field that some of your customers were giving discounts that you considered to be injurious to the business, you wrote to the customer as you have testified?

A. Not always.

Q. But to some of those you did?

A. Some of them; yes.

Q. What did you do with respect to those who were giving these high discounts, to whom you did not write? Did you send some of your field men to interview those demoralizers?

A. That was our general policy. We may have made exceptions to it.

Q. Your general policy was known to the trade, was it not?

A. Our policy was outlined in our circular.

Q. That is, your circulars, which are in evidence, and known as respondent Lorillard's Exhibits A, B, C, D, and E. Is that correct?

A. If that is what those circulars are, that is correct.

Examiner McCORMACK. That is what they are.

A. Yes.

1124 By Mr. SMITH:

Q. Did you give your field men any instructions as to the meaning of those circulars known as Lorillard Exhibits A, B, C, D, and E in this case?

A. As I testified yesterday, I do not recall that we gave our men any written instructions in reference to them.

Q. Did you give them any oral instructions?

A. Oh, we talked over these various conditions with our men, as they arose from time to time.

Q. I am asking you whether you gave any instructions to your men as to the construction or interpretation to be placed on these circulars known as Lorillard's Exhibits A, B, C, D, and E?

A. We thought our circulars were plain enough, and our men had intelligence enough to interpret them. We do not consider that there is anything very difficult about the wording of those circulars.

Q. So that these circulars come within the classification of those which you described in your direction examination as being not ambiguous?

A. Yes, sir.

Q. When you received complaints from your customers or from your field men regarding the so-called demoralizers, and you continued to sell to those demoralizers after these complaints had been made to you, is it not a fact that those people who were complained against changed the discounts that they were giving to their trade?

A. In some instances they did. In other instances they did not.

1125 Q. You endeavored and the Lorillard Company endeavored to have those demoralizers conform to the discount given by the bulk of your distributing power in other sections. Is not that correct?

A. We endeavored to convince those people whom we presumed were our friends that it was an injury to our business and that we did not believe that any customer with whom we had friendly relations would want to do so.

Q. In other words, you did the best you could with those so-called demoralizers to influence them to change their rate of discount from these high discounts, which had demoralized conditions, to lower discounts which would not disturb or agitate the balance of your power in that community?

A. Without requesting any promise or agreement from them to do so; and in every instance we tried to impress upon them before leaving, at the end of the conversation, that we had no desire whatever to dictate to them.

Q. No desire to dictate to them?

A. That we had no desire to dictate to them how to run their business, and they understood that they were at liberty to sell such goods as they had at such prices as they felt were proper.

Q. And they understood from your circulars, and your circular of course would convey the understanding, that if they continued selling at the prices that you considered to be injurious to your company they would be cut off from the direct list of your company?

A. They probably got that impression in many instances.

1126 Q. Well, as you say, these circulars A, B, C, D, and E are not ambiguous and they clearly show that that is what will happen, do they not?

A. They do not say so.

Q. Didn't you intend to say so in these circulars?

A. If we had, we would have put it in there.

Q. As a matter of fact, do you not say so in these circulars?

A. No; we do not.

Q. What did you mean, then, and what does this mean in circular 1350: "We believe you will agree with us that it would be a very shortsighted policy to continue to supply such firms with the means of demoralizing our accustomed channels of distribution"? Does not that mean that you will discontinue selling to firms who demoralize your accustomed channels of distribution?

A. I do not interpret it in that way.

Q. How do you interpret it?

A. I interpret it to mean just what it says.

Q. And it says what it means, and means nothing except what it says, in your opinion?

A. Yes.

Q. And you will have the examiner understand you to say so?

A. Yes.

Q. And when you say in a subsequent paragraph of Exhibit A: "We trust it will be your pleasure to cooperate with us in preventing that which is undesirable," do you desire to have the examiner understand and to have the commission understand from your testimony that those two paragraphs do not mean that you will cut off from your direct list anybody who demoralizes your accustomed channels of distribution.

A. I do not presume that the examiner would get any other inference from it than what those paragraphs signify.

Q. And the paragraphs, you will have the examiner understand, do not signify that the Lorillard Company will not continue to supply firms with the means of demoralizing your accustomed channels of distribution?

A. It does not say so, and as a matter of fact there were hundreds of instances that we took up, that we never cut off.

Q. That is, because you took it up with them and they agreed not to continue demoralization. Is not that so?

A. In some instances they did and in some instances they did not, but they did not agree to do anything, as we always, at the end of our conversation, told them that we asked them to agree to nothing. Their subsequent action would be sufficient to us to know whether or not they were desirous of continuing to injure our business.

Q. And the subsequent action was sufficient to enable you to know that they did agree not to continue demoralization, wasn't it?

A. Not at all.

Q. Why then did you say in the first part of your answer to the next previous question that in many instances these demoralizers did agree not to continue demoralizing?

A. If I used the word "agree" it was an error. I did not mean to use that word.

Q. Or rather a slip?

1128 Mr. CALDWELL. I object to this question, Mr. Smith. Mr.

Examiner, Mr. Smith has repeatedly put questions here which seem to me simply intended to confuse rather than to clarify, and Mr. Ball in answering that in some instances they did and in some instances they did not made his explanation that there was no agreement. Now, I do not think it is fair, proper, or in any sense right to have that answer characterized as a slip, and I move to strike out from the minutes that question of Mr. Smith's.

Mr. SMITH. I want to reply to that objection. If my recollection serves me right this witness did testify that in some cases demoralizers did agree not to continue to demoralize, and in some other cases they did not. Now the witness is trying to retract that word "agree," as he used it in that answer.

Examiner MCCORMICK. Gentlemen, the record will show just what he said, and he explains himself, and when Mr. Smith asked him if he did not make a slip, he is able to take care of himself about that. There is no need of any objection or any explanation about it.

Mr. CALDWELL. I take an exception.

By Mr. SMITH:

Q. I understood you to say, Mr. Ball, that some of the
1129 demoralizers agreed not to continue demoralizing and that others did not agree to cease demoralizing. In the case of those who did not agree to cease demoralizing what did your company do? What action did your company take?

A. If I said "agree" I said it in error, as we particularly avoided any agreements of any nature.

Q. What did the company do with those demoralizers who according to your answer to one of my questions did not agree to stop demoralizing? Did they continue selling all of those firms, or did they discontinue selling some of them?

A. If there was any agreement on the part of any of these concerns, as I have stated before it was without my knowledge, and the action that the company took upon the reports of their men in these specific cases depended upon conditions applying in each individual case.

Q. That is speaking now of those who did not agree to discontinue?

A. None agreed to my knowledge.

Q. Those who did not agree you say were passed upon according to their particular merits. Is that correct?

Mr. CALDWELL. I object to the question.

The WITNESS. May I just ask if—

Mr. CALDWELL. Let me finish my objection. I object to the question on the ground of the assumption by Mr. Smith of testimony that is not in the record.

Examiner MCCORMICK. What is the question?

1130 (The stenographer read the question as follows):

"Q. Those who did not agree you say were passed upon according to their particular merits. Is that correct?"

Examiner McCORKLE. The witness has said they did not agree to anything. He knows how to answer the question. He does not need any instruction from the attorney or from the examiner, how to answer the question.

Mr. CALDWELL. Pardon me, I did not intend any criticism either of the examiner or of the witness, but I have objected to the question on what I think are perfectly legal grounds.

Examiner McCORKLE. Objection overruled.

Mr. CALDWELL. Exception.

A. I cannot answer that question intelligently, because you are embodying a condition that did not exist.

By Mr. SMITH:

Q. That is, you object to the use of the word "agreement" or "agree," do you?

A. Because it did not exist to my knowledge.

Q. I say you object to the use of the word "agree" or "agreement" in the question?

1131 A. I object to answering a question based on something that as far as I know was not possible.

Q. Is not that because you object to my use of the word "agree" in the question?

A. Because there was no agreement; yes.

Q. And as you say, in these cases where you had complaints, you either wrote or had your men visit the so-called demoralizers, and you endeavored to have the so-called demoralizers see that by continuing to sell at demoralized discounts the business of your company was being injured?

A. Yes.

Q. That is what you did?

A. Yes.

Q. Now, with respect to the number of so-called demoralizers that you either wrote to or had your men interview for the purpose of making your meaning made clear to such demoralizers, what percentage of them in 1921, after the issuance of your circulars known as Lorillard Exhibits A to E, changed the discounts they were allowing, so that they would not continue longer to demoralize your products or your other customers?

A. I could not say.

Q. Can you tell us the percentage of them who did not change their discounts so that they would no longer be demoralizers?

A. I could not.

Q. Were some of those who did not change their discounts so that they would no longer be demoralizers after you and your men had taken the matter up with them, continued on the direct list of your company, or were some of them discontinued from the direct list of your customers?

1132 Mr. CALDWELL. I think we ought to specify in 1920 and 1921, and in Philadelphia and Cincinnati. There ought to be some limit of time and place.

By Mr. SMITH:

Q. I want the witness to understand that this question has to do with the period in 1921 after the issuance of circulars known as Lorillard Exhibits A to E, and as covering not Cincinnati and Philadelphia alone but the entire country.

A. Up to what period?

Q. Up to the end of 1921.

A. I can not answer this question as you have asked it, as a whole. If you will divide that question, I think I can answer it.

Q. Will you answer it, please, considering that it has been divided? Will you divide it yourself? You may answer the question as if it had been divided.

A. Will the stenographer please read the question?

(The stenographer read as follows:)

"Q. Were some of those who did not change their discounts so that they would no longer be demoralizers after you and your men had taken the matter up with them, continued on the direct list of your company—"

A. If you will stop right there, I will answer. I presume they were.

1133 Mr. SMITH. Let the stenographer read that question again and stop at that point.

(The stenographer read as follows:)

"Q. Were some of those who did not change their discounts so that they would no longer be demoralizers after you and your men had taken the matter up with them, continued on the direct list of your company?"

A. I presume they were.

Q. That is, some continued to buy, although they did not change their rates of discount. Is that correct?

A. I presume so, because conditions were changing all the time during those years, and the ruling that we might make on the first of July we might change the first of August.

Q. And were some of those who did not change their discounts after they had been interviewed or written by your company discontinued from your direct list in the period from June 1, 1921, to the end of 1921?

A. Yes.

Q. Did the policy of the company change from the first of June, 1921, to the end of 1921 with respect to these circulars issued by your company known as Lorillard's Exhibits A to E, both inclusive?

A. Our general policy and feeling was retained, but owing to the impracticability as we found in stopping this demoralization, we felt that—

Q. Will you please tell us what you did?

1134 Mr. CALDWELL. This is a perfectly proper answer, and it seems to me the witness ought to be permitted to finish his answer. The answers are not nearly so long as Mr. Smith's questions.

Examiner McCORKLE. Let him answer it.

Mr. SMITH. It seems to me when I ask this witness a simple question, whether the policy of the Lorillard Company as outlined in these circulars continued during the year 1921 or changed at any time between the first of June and the end of 1921, the witness can answer, yes or no. That is the question I have asked.

Mr. CALDWELL. A lot of those questions can not be answered honestly, yes or no.

By Examiner McCORKLE:

Q. Mr. Ball, did you understand the question?

A. I understood the question as I tried to answer it, and in explaining what I meant and why it would be impossible to outline the policy for any given time in our business, we changed our policy sometimes over night.

Examiner McCORKLE. Go ahead, Mr. Smith.

By Mr. SMITH:

1135 Q. I did not ask for any reasons for any change. Mr. Ball, let me ask you again whether the policy of the Lorillard Company as shown in these exhibits known as Lorillard Exhibits A to E, inclusive, continued throughout the year 1921, that is, from June 1st, or whether that policy was changed in that period?

A. Our feeling as to the correctness of the policies was the same during the year, but our ability to stop this general demoralization was demonstrated to be very often ineffective.

Q. When in 1921 did it appear to your company that your policy as exemplified in these exhibits I have named would be ineffective or was ineffective?

A. I do not recall when that happened, Mr. Smith.

Q. Your idea that the policy as exemplified in these exhibits could be effective continued until the latter part of 1921, did it not?

A. It continues up to the present time, as far as that matter is concerned—our idea.

Q. I am not talking about your ideas, if you please. I am asking you whether you became convinced or got the notion in the latter part of 1921 that your plan as outlined in these circulars would be ineffective?

A. Just what part of the year I do not recall, but we became convinced during the year at some time that our efforts were not effective to stop this demoralization.

Q. You discontinued shipping to Seider in September, 1921, did you not?

A. I don't recall when it was. We never discontinued shipping—I got Seider mixed up with the Cincinnati fellow—I don't recall when we stopped Seider.

1136 Q. And it was in September, 1921, that your company wrote to the Janszen Grocery Company suggesting to the Janszen Grocery Company that it buy your products from your other jobbers. Is not that correct?

A. That is a letter from our credit department, yes, sir; but that is incorrect. We never took him off our direct list, and the instructions as I recall that were given them say to hold up his orders.

Q. But it was on that date that you referred the Janszen Grocery Company to your other jobbers for supplies of your products?

A. Yes, from that letter it would seem so.

Q. So that you were carrying out your policy expressed in your circulars, at least until the end of September, 1921?

A. In that particular instance.

Q. Did you carry out the policy exemplified in these circulars as to anybody else as late as September, 1921?

A. I do not recall.

Q. Your company was quite active in inducing its customers not to demoralize conditions, wasn't it?

A. We were active only when we felt that the conditions warranted us in being active, feeling that that particular case was an injury.

Q. And your form of action was that which you have described, either by letters to the demoralizers or by your visits of your field men to them?

A. Yes.

Q. Now, was there any other form that your activities took to prevent demoralization, other than your circulars and the visits of your men on complaints, and letters written by your
1137 company on complaints?

A. If you mean that when these complaints were sufficiently strong to make us feel that it was an injury to our business we discontinued selling some customers, that might be construed as another form.

Q. Did you as a matter of fact do some pioneer work to prevent demoralization in anticipation, or before your circulars in evidence in this case were sent?

A. I do not think so.

Q. And didn't you not only investigate complaints that had been made, but did you not in the absence of complaints have your men visit the trade so that there would no longer be continued this demoralization which you speak of?

A. If any complaint comes to our office of whatsoever nature at any time whatsoever, that we think of sufficient importance to investigate, we do so.

Q. Have you since your subpoena in this case was served upon you found a copy of your letter written to C. O. Goodnow of Sioux City, Iowa, on August 29, 1921?

A. I have not.

Q. Have you found, since this subpoena was served upon you—

A. Excuse me, Mr. Smith. That subpoena has never been served upon me personally. At the time the subpoena was received at the office I was away, sick.

Q. Have you seen the subpoena?

A. No, sir.

Q. Have you ever been advised of the contents of it?

A. I have been advised that there was a subpoena.

Q. It was served at your office?

A. Yes.

Q. In your absence?

A. Yes.

1138 Q. When did you first learn that there was such a subpoena served at your office?

A. I think I learned it when I was home, sick.

Q. And you have never been advised of the contents of the subpoena?

A. I was advised, as I recall, and that was all I was advised, that I was expected to report at the office.

Q. Were you advised that this subpoena called for the production of certain papers by you?

A. I do not recall it. I was in such condition at the time the subpoena was served that Mr. Caldwell may have said something to me that I did not grasp and do not remember.

Mr. CALDWELL. Mr. EXAMINER, if there was such a subpoena served, which I do not dispute, I understand this witness has not been called in obedience to that subpoena at all, but when I produced him here he was called as a witness of the Lorillard Company after the case of the commission had been closed and therefore that subpoena would not apply.

Mr. SMITH. I produce photostat copies of two letters which I ask the reporter to mark "Commission's Exhibits 124 and 125."

Mr. CALDWELL. These are simply marked for identification?

Mr. SMITH. Yes, for identification.

(The letters so referred to were marked for identification "Exhibits 124 and 125.")

1139 By Mr. SMITH:

Q. Your circular No. 1369 was sent as you testified to jobbers in Wisconsin. Is that correct?

A. I think so; yes.

Q. I ask you whether your statement on your direct examination that circular 1369 was the one you sent to Wisconsin is correct?

A. Yes.

Q. It was not the circular sent to Ohio?

A. No.

Q. Which was the circular sent to Ohio?

A. No. 1360.

Q. One thousand three hundred and sixty-nine, Lorillard's Exhibit E, is a repetition of the exact language of circular No. 1360, Lorillard's Exhibit B, is it not?

Mr. CALDWELL. I object to that question on the ground that the circulars speak for themselves.

Examiner McCORKLE. If the witness has the time to examine them and compare them, and he can see that they are the same, he can make some statement to that effect.

A. I would not answer positively without comparing them.

By Mr. SMITH:

Q. To save time I will withdraw the question—

Mr. CALDWELL. It is absolutely a needless question.

Mr. SMITH. I do not think so.

1140 By Mr. SMITH:

Q. Your policy through Ohio in 1921 from the first of June was the same as the policy of your company in Wisconsin in the same period, was it not?

A. Our feeling was the same; yes.

Q. Your feeling was the same throughout the entire country, wasn't it?

A. Yes.

Q. In other words, the business policy of the Lorillard Company as exemplified in these various circulars which are in evidence and known as Lorillard's Exhibits A to E, inclusive, was not a policy confined to any particular area, but was a general policy throughout the entire country?

A. Yes; we always want the jobbers to make a profit on our products over and above their cost of doing business.

Q. I show you a photostat copy of a letter known as commission's Exhibit 124 for identification, and ask you whether you received that letter?

A. Yes, sir.

Q. I show you a photostat copy of a letter dated August 29, 1921, by D. H. Ball, vice president, to C. O. Goodnow, known as commission's Exhibit 124 for identification, and ask you whether you wrote that letter, the letter of which that paper is a copy?

A. Yes.

Q. This paper known as commission's Exhibit 125 for identification is the answer made by you to the paper known as commission's Exhibit 124 for identification, is it not?

A. Yes.

1141 Mr. SMITH. I offer in evidence both of these papers and ask that Exhibit 124 for identification be received as commission's Exhibit 124 and that Exhibit 125 for identification be received as commission's Exhibit 125.

Examiner McCORKLE. They will be so received and marked.

(The documents so referred to were received in evidence and marked "Commission's Exhibit 124," and "Commission's Exhibit 125," and are forwarded herewith.)

By Mr. SMITH:

Q. I think you said, Mr. Ball, that it was the policy of the company in discussing demoralization with demoralizers to tell such demoralizers that while your company could not and would not fix a price at which its jobbers should sell, it would discontinue selling to those that it considered to be injuring its business. Is that correct?

A. That was our policy to tell the other fellow that.

Q. To tell the demoralizers; yes.

A. No; if I stated that, that was an error.

Q. Tell us what you did tell the demoralizers that had been complained against to your company in that connection; that is, in the period from the time these circulars were issued up to the end of 1921?

A. What we told the demoralizers, the sense of what I recall 1142 was told most of them—was that we considered the way they were operating was an injury to our business, and we did not feel that if they knew that, that they as friends of a concern with whom they had been doing business for years would continue it.

Q. Did you call their attention to the circulars you had issued, Exhibits A to E, or either of them?

A. We probably did.

Q. And as you say there was nothing ambiguous about those circulars in your opinion?

A. I do not think so.

Q. And you said on your direct examination that your company had no plan of reporting price cutters. You remember saying that, don't you?

A. I think I supplemented that answer by saying other than the complaints that came to us and the reports of our men, but we had no established plan.

Q. Except that your men knew that it was your policy to have them report to the company anything that would be injurious to your company?

A. Yes.

Q. And your men knew that it was the attitude of your company that its business would be injured if any of your customers would be giving discounts which would disturb your other customers in that section?

A. To the extent of injury our men would report such cases.

Q. Well, your men knew that it was the attitude of your company that such cases should be reported to the company?

A. Our men knew that they were expected and paid to 1143 report any instance that in their opinion would prove an injury to our business.

Q. You said you had no list of price cutters. You do not mean by that to say, however, that you did not keep a list of your cus-

tomers whose shipments were suspended because of their demoralizing conditions, especially in the latter half of the year 1921?

A. Well, by "list" I mean that we had no regular form list. If a man was discontinued or his orders were held up, those instructions were given to the credit department.

Q. And the credit department had the names of all your customers whose shipments were discontinued or held up for the reason that those customers had demoralized conditions?

A. Yes.

Q. This price list that has been spoken of during your examination in this case on scraps and tobacco, as I understand it, is a list that does not apply to the consuming trade. That is, it does not go beyond the transaction from the jobber to the retailer. Is that correct?

A. Not entirely. As I said or tried to explain in my general explanation yesterday, the list specifies the size of the packages, as the price so much per gross.

Q. You mean the manufacturer's price?

A. Yes; so much per gross on 15-cent sizes, so much per gross on the ten-cent size, so much per dozen on the 50-cent size, and so much per dozen on the dollar size.

Q. I mean that so far as the use of that list is concerned—

A. It is confined to the jobbers.

1144 Q. It is confined to the jobber, and possibly from the jobber to the retailer, but not between the retailer and the consumer. Is that correct?

A. Yes.

Q. In other words, I will put it in a long statement and see whether you agree with me. If, for illustration, take the manufacturer's list price, if the manufacturer's list price is ten dollars, that stuff goes to the jobber at list price less ten per cent and 2 per cent additional for cash within ten days?

A. Yes.

Q. That is correct?

A. Yes.

Q. Now, the jobber sells to his retail customer on the basis of the list, and gives to the retailer a discount from that ten-dollar list price, depending, of course, upon the locality in which the jobber is doing business. Is that correct?

A. Not in all cases does he give a discount. He sells on a basis of ten dollars. Sometimes it is ten dollars, sometimes it is ten dollars less the discount, but seldom over ten dollars.

Q. Yes; but in case he sells to the retailer on a discount basis, the discount is on the basis of a discount from the ten dollars that I have used in the illustration. Is not that correct?

A. Yes; but sometimes the jobber makes a net price.

Q. I understand that, but don't you see I am trying to find out what happens where the jobber is selling at a discount from the list?

A. And I am trying to give you as specific information as I can.

1145 Mr. SMITH. It seems to me that all it is necessary for the witness to answer there is yes, and I would like to have the rest of his answer stricken out.

Mr. CALDWELL. I object to striking out what is properly a part of the record. His whole answer should remain in the record.

By Mr. SMITH:

Q. I have asked you, Mr. Ball, and you have given answers as to the application of the list price where the jobber sells to the retailer on the basis of a discount from the list price. Do you remember that?

A. Yes.

Q. You remember my asking you those questions and your answers, don't you?

A. Yes.

Q. There are cases, are there not, where when the jobber sells to the retailer he does not sell at a discount from the list price but sells at a net price?

A. Yes.

Q. So I have asked my questions and you have told in your answers the two usual ways, as to the basis of price, that the jobber uses in selling to the retailer, one on the basis of a discount from the list price, and the other on the basis of a net price?

A. Yes.

Q. And those are the two ways that are used, are they not?

A. They are the two usual ways.

Q. Are there any other ways that are used?

A. I do not recall off-hand any others.

Q. In other words the list price charged by the manufacturer to the jobber does not go beyond the retailer?

A. No, sir.

1146 Q. In other words, there is no connection between the list price of the manufacturer and the price which the consumer pays to the retailer?

A. Other than that allusion that I referred to.

Q. That is on the net-price basis?

A. No; on the 10-cent package and on the 15-cent package, and so on.

Q. Is Mr. Fitzsimmons still with your company?

A. Yes, sir.

Q. What position does he now hold?

A. He is now sales manager in a specific territory in the United States.

Q. And what is that territory?

A. Kentucky, Tennessee, and Ohio.

Q. Does he have an office from which he corresponds with your company?

A. No, sir.

Q. And a mailing address in any of those places?

A. No, sir.

Q. How long have you known Charles Seider, a Philadelphia tobacco jobber?

A. I never saw him in my life, as I testified yesterday.

Q. Do you know how long he has been in business in Philadelphia?

A. Since this difficulty arose last year, I understand it has been about thirty years.

Q. Do you know how long he had been a direct buyer from the Lorillard Company, up to the time your shipments were withheld in 1921?

A. I looked that up, and he has been buying from the present Lorillard Company since December 1, 1911, in very limited quantities.

1147 Q. On what date did you suspend shipments to Seider?

A. I have not that date.

Q. Have you given us all the conversation you remember taking place between you and Charles Seider, Jr., on the occasion when he visited your office in New York after his father's shipments from your company had been withheld?

A. I tried to give you all I remembered.

Q. And you did give us yesterday all that you remembered?

A. Yes.

Q. Have you since yesterday remembered anything in addition that took place in that conversation; that is, in addition to what you testified to yesterday?

A. No, sir; I have not given the matter any thought.

Q. Have you an employee by the name of Omera?

A. Yes.

Q. How long has he been in your employ?

A. I think since December 1, 1911.

Q. In 1920 what position did he hold with your company?

A. He had charge of the cigarette department in Philadelphia.

Q. What does that mean?

A. That means that he was the head salesman in charge of our retail men in that territory, selling, doing advertising, missionary work, and doing such other duties as a man in the field is supposed to do.

Q. Who is your man that visited the jobbing trade in Philadelphia for the purpose of selling the jobbing trade in 1921, that is the head man?

A. In 1921?

1148 Q. Yes.

A. We had three men located there.

Q. What were their names?

A. Mr. Omera, Mr. Newman and a scrap man whose name I cannot tell you right now.

Q. Was Mr. Omera Mr. Newman's superior, or was Mr. Newman Mr. Omera's superior, or was the head man there different at different times in 1921?

A. No; they had no connection with each other. One represented one department and the other represented another.

Q. In other words Newman was the head of one department in visiting the wholesale trade and Omera was the head man of another department visiting the wholesale trade?

A. Filling the same positions.

Q. Both of these men had employees of the Lorillard Company who worked under their direction, did they not?

A. Yes.

Q. How many men in 1921 did Mr. Newman have working under his direction?

A. Approximately 8 or 10.

Q. How many men did Mr. Omera have working under his direction?

A. Approximately 12 or 15.

Q. Were all of these three men, that is Mr. Newman and Mr. Omera and the other man in charge of the department whose name you do not now recollect familiar with your business policies in 1921?

A. Yes; I hope so.

Q. And did you instruct those men, or was it the policy of your company to have those men carry out the business policies of your company in 1921?

A. It is our policy to have our men carry out our policies.

1149 Q. And as far as you know your men in Philadelphia did carry out your policies in 1921?

A. Yes.

Q. Your business policies?

A. Yes.

Q. In Philadelphia?

A. Yes.

Q. And your business policy was also known to Mr. Fitzsimmons in 1921, was it not?

A. Yes.

Q. And it was his job to carry out the policy of your company?

A. Yes.

Q. And he did carry out the policy of your company, did he not?

A. Yes, but as I have explained, in so far as you connect the two men in this question, the policy in Cincinnati was not necessarily the same policy in Philadelphia.

Q. But Mr. Fitzsimmons did carry out the Lorillard Company's policies in Ohio in 1921, did he not?

A. He was instructed to.

Q. And as far as you know he did?

A. As far as I know he did.

Q. He reported to you from time to time what he was doing?

A. Yes.

Q. By way of furthering the interests of the Lorillard Company?

A. Yes.

Q. And the interests of the Lorillard Company were furthered as a matter of fact by Mr. Fitzsimmons in his territory in 1921, were they not?

A. Certainly.

Q. On your direct examination you were asked this question, and your answer to the question was "No, as to the whole question."

I will repeat the question to you and ask you how the question
1150 in your opinion should have been divided or still can be divided so that you may say no as to a part of it and give any other answer that you desire to another part of it. The question is as follows:

"Did you or any of your officers suggest that jobbers hold conferences and that your company would assist or could assist by withholding shipments?"

On your direct examination as I have suggested you said your answer was "No" as to the whole question. Do you remember that?

A. Yes, I think I do.

Q. Now, because of the answer you made to that question I am asking you why you said "No, as to the whole question." Why did you make that answer?

A. That question was connected in such a way that "No" was the only answer I could make to it. To some parts of it that answer "No" would not apply, but "No" as a whole would apply.

Q. What are the parts of the question to which the answer "No" would not apply?

A. The forepart of it.

Q. I will read the question and will you let me know when I come to the point you consider the forepart and just stop me, please. "Did you or any of your officers suggest that jobbers hold conferences, and that your company——"

A. Wait there.

Q. That is the forepart of the question?

A. Yes, and that I should answer "Yes." I would answer "No" to the remainder of the question.

1151 Q. I will try to paraphrase the remainder of the question.

You would say "no" if you were asked whether you or any of your officers suggested that your company should assist by withholding shipments. Is that correct?

A. That answer is "no." "Not to my knowledge" would be more exact.

Q. Then you did suggest, or some of your officers suggested that jobbers hold conferences, and that your company could assist?

A. No; we would do what we lawfully could. Probably I may have said that.

MR. CALDWELL. One moment, Mr. Smith. When we stopped you, he meant to stop you before you used the words "and assist."

MR. SMITH. I do not think so.

The WITNESS. Yes; I did.

Mr. CALDWELL. Yes; he did.

By Mr. SMITH:

Q. All right. I will repeat the question, and will stop where you want me to stop. Did you yourself suggest that jobbers hold conferences?

A. Yes.

Q. To jobbers located in what city did you make that suggestion?

A. I do not recall.

Q. To jobbers located in what cities did any of the officers of your company make the suggestion that they hold conferences?

A. I do not recall.

1152 Q. Did you suggest to anybody in Philadelphia, that is to jobbing customers, that they hold conferences?

A. I do not recall, but I hardly think it possible, because they have been holding conferences over there for ten years, but they have never amounted to anything, and it would have been a foolish suggestion to offer.

Q. Did you suggest to any Cincinnati or Covington, Kentucky, jobber that the jobbers in Cincinnati hold conferences?

A. I suggested, as you have on your records, that there was a movement on foot, and so wrote one or two of them in reference to it.

Q. By that answer do you mean that you want your letters that you wrote, for instance to Fennell and the letter that you wrote to the Janzen Grocery Company, in evidence in this case, to be construed as suggesting that Cincinnati jobbers hold conferences?

A. Yes.

Q. Now to jobbers located in what other cities did you suggest that jobbers hold conferences?

A. I do not recall.

Q. Did you make some of those suggestions orally?

A. Most likely.

Q. To jobbers located in what cities did you make such oral suggestions?

A. I do not recall. There have been suggestions from all over the United States.

Q. I suppose the jobbers would come into New York to see you. Would you there make those suggestions to them?

A. I have to say something, you know, and I wanted to be agreeable.

1153 Q. To those jobbers when they came to New York would you make those suggestions?

A. Yes.

Q. Whether jobbers from Cincinnati came to see you at New York and you made suggestions to them, you do not remember?

A. No, sir.

Q. As to Philadelphia you say you did not make suggestions. Is that correct?

A. No, I did not say that. I said I did not recall. I said the situation was such over there that it would have been foolish for me to have done so.

Q. Did you know that there was an association of tobacco jobbers in Philadelphia in 1920?

A. In 1920?

Q. Yes.

A. I presume I did.

Q. Did you know that that association, composed of practically the entire tobacco jobbing trade in Philadelphia had agreed upon a maximum discount of 8 per cent to the retail trade?

A. No, sir.

Q. Did you know that they had agreed upon any maximum discount?

A. No.

Q. Or upon any discount?

A. No, sir.

Q. Did you learn at any time that the prevailing and customary discount being allowed by the jobbing trade in Philadelphia was 8 per cent off list?

A. I most likely heard that; that is to say I know specifically that they were giving 2, 3, 4, or 8, I do not know that; but those things were trade gossip, and it is very likely I heard them.

Q. And it is very likely you heard from trade gossip that 1154 the maximum discount of 8 per cent was changed to a maximum discount of 7 per cent in the early part of 1921?

A. Most likely.

Q. What did you say to these jobbers who visited you in New York when you suggested that they hold conferences? What did you say in that connection?

A. I could not answer that question.

Q. What kind of conferences did you suggest to the jobbers that they should hold?

A. Get-together conferences. I would construe conferences to mean get together.

Q. In other words, you suggested to the jobbers that they get together, and I suppose that in these conversations with the jobbers they were discussing "demoralization," as you term it?

A. That was the principal subject of discussion.

Q. And you suggested to the jobbers that they get together and hold conferences to stop the demoralization?

A. Yes.

Q. Did you suggest to any of these jobbers along with your other suggestions, how your company might help in preventing the demoralization?

A. No.

Q. Or in stopping the demoralization after the conferences were held?

A. No, sir, I do not think so.

Q. Did you make these suggestions or some of them prior to the issuance of your circulars known as Lorillard Exhibits A to E?

A. I think I have been making those suggestions for ten years, as suggestions.

1155 Q. So you did make them prior to the issuance of the circulars, and subsequent to the issuance of the circulars?

A. You know the jobbers come to us with all their troubles, and the least we can do and the least expensive thing is to give them sympathy, and I am always willing to do that, and I hope that they will go away feeling better, feeling that we at least have sympathy for them.

Q. Yes, but to come back to the question. Do you think you made these suggestions to the jobbers to get together and hold conferences so as to prevent demoralization both before you issued your circulars and after your circulars were issued?

A. Most likely.

Q. Do you know whether in these discussions or suggestions you made to the jobbers that they get together and hold conferences you interpreted for such jobbers your circulars Lorillard's Exhibits A and E, inclusive, or any of them?

A. No; I did not.

Q. I suppose that when those circulars were sent out you received a great number of letters from your jobbing trade?

A. Quite a great many.

Q. And I suppose that when the jobbing trade called upon you in New York, a natural subject of conversation was your circulars?

A. Many times.

Q. And did you tell those of your customers with whom you discussed the circular what the circular meant, or did you feel rather that the jobbers themselves knew exactly what it did mean?

1156 A. I felt that it was self-explanatory in most instances, and if they asked a question I told them that was the way we felt about the matter.

Q. When they asked you the question, that is those to whom the circulars were not unambiguous, what did you tell them?

A. I don't think those who understood it asked me much about it, if anything.

Q. I am directing your attention to those who according to your testimony did not understand it. What did you tell those who said they did not understand the circular, what the circular meant?

A. I told them that the Lorillard Company had provided ten per cent, that it was costing us a great deal of money to provide this, and we hoped that it would be their pleasure to retain it. I always put it up to the jobber to do as he saw fit, unless we felt that what he was doing was an injury, and then I tried to show him the injury.

Q. Is that all the answer you want to make to my question as to the interpretation you gave to those jobbers who said they did not understand the circular?

A. I think that is sufficient.

Q. Did Mr. Newman of your company who worked in Philadelphia ever call to your attention a letter addressed to him by Mr. McAninley of Schoenfeld and McAninley, a copy of which is in evidence in Docket No. 86, and known as Exhibit No. 15?

A. I think I recall this letter having come into our files.

Q. Did you give any instructions to Mr. Newman as to what
1157 disposition to make of this letter by way of answering it or otherwise?

A. No, sir; a letter of that kind would most likely go in the waste basket, from Philadelphia.

Q. And that you say is the reason for the letter not having been answered, in case it was not answered?

A. If it required an answer. That letter does not require any answer from us. I say that is just one of the troubles we have been having in fifteen years from Philadelphia.

Q. That is the reason why the letter was not answered?

A. Yes, we were not interested.

Q. When you said on your direct examination that you had no machinery for jobbers reports, I assume that you meant to make that statement having in view the proposition that your salesmen and your field men were under duty to report to your company whatever those salesmen thought would injure your company's best interests. Is that correct?

A. I don't know that that would enter into it at all. We never have had any machinery or plan with a jobber to report conditions for us.

Q. That is, there is no working machinery between your company and your jobbers to report conditions?

A. Absolutely not.

Q. But you do not mean to say, however, Mr. Ball, that your company did not receive from time to time letters or complaints from jobbers about others of your jobbers?

A. No.

Q. And you do not mean to suggest in your answer, when you said you had no machinery for jobbers reporting, that it was not
1158 the duty of your salesmen to make reports to your company on whatever they thought advisable to report?

A. It was the duty of our salesmen to make reports to us of conditions that they thought were either beneficial or otherwise.

Q. So that if that system would be construed as machinery, you had machinery to that extent?

A. Of course we had our selling force to keep us posted in the territory.

Q. In your direct examination you attempted to define the word "legitimate" in so far as it applied to a jobber, and you used the term "legitimate jobber." Did you on your direct examination include all of the elements that made up a legitimate jobber, or were there some other elements that you might think would enter into the

proposition as to whether a jobber was or was not a legitimate jobber?

A. The word "legitimate" as applied to the jobber, as I thought I explained, meant a jobber who purchased goods direct from us to sell again to the retailer; but we had made exceptions in putting on direct customers, as I explained, in sections of the country, for various reasons.

Q. Having so defined a legitimate jobber, would you say that a jobber who "demoralized conditions" in his territory, to use a phrase which you have used so often in your answers, was not a legitimate jobber?

A. Many legitimate jobbers have at times demoralized conditions.

1159 Q. Well, the jobber who continually demoralizes conditions is not considered a legitimate jobber, is he, as the word is used in the tobacco trade?

A. Oh, a legitimate jobber may be a man, as I say, who buys goods to resell to the retail trade.

Q. And he is a jobber who buys to sell to the retail trade at what you term a "living profit," and if he sells or continues to sell at a profit which you think is not a living profit, you do not consider him a legitimate jobber, do you?

A. He may be a legitimate jobber and a very undersirable customer.

Q. But you would still call him a legitimate jobber, would you?

A. Yes.

Q. Now, for illustration's sake, there were a jobber who was buying directly from one manufacturer—as I understand there are numerous jobbers who sub-job their products at so-called demoralized prices—does such a jobber come within your definition of a legitimate jobber?

A. He might.

Q. And might not?

A. And might not.

Q. You said on your direct examination that in putting a jobber on your direct list you do not consult with your other jobbers.

A. Certainly not, or in many instances we would have only one jobber.

Q. Have you had complaints in the course of the past two years in which jobbers have said that you had enough distributors in their territory?

A. So long as I have been in the business.

1160 Q. And is it not true that in some of those cases where your jobber customers have thought you had good distribution, you have declined to add to your direct list of customers in that territory?

A. We may have, but not for that reason alone.

Q. But that reason would enter into it, and has entered into it hasn't it?

A. It has some bearing; yes.

Q. You also have a Mr. Belt in your employ?

A. Yes, sir.

Q. What position does he hold with your company?

A. Vice president.

Q. How long has he been vice president?

A. Since December 1st, 1911.

Q. What department has he charge of?

A. In 1920 and 1921 he had charge of the cigarette department.

Q. Do you remember testifying under direct examination that many of your complaints by your jobber customers against other jobber customers were pigeonholed and nothing done with them?

A. Yes, sir.

Q. You did not pigeonhole those that concerned the Janszen Grocery Company or Mr. Syder, of Philadelphia, did you?

Mr. CALDWELL. One moment. I do not think, Mr. Smith, that there has been any evidence that there were complaints from customer jobbers in reference to Mr. Janszen or in reference to Mr. Syder.

Mr. SMITH. I think there is, Mr. Examiner. At least, it is 1161 in this shape. The witness said that he does not recollect whether the reports upon which he acted came from his own selling force or whether they came from his own agents.

The WITNESS. I do not know that we got any from jobbers in reference to these two parties.

Q. However, as I understood your examination heretofore, you won't say that you did not get complaints about those parties?

A. No, sir.

Q. But you did not mean to suggest, did you, on your direct examination, that you pigeonholed all of the complaints made by your jobber customer about Janszen Grocery Company?

A. No; I did not say that, I do not think.

Q. You said in that same connection no action was taken by your company until there was an investigation and a report. You remember that, don't you?

A. Yes, sir.

Q. How many jobbers of the company were withheld shipments or cut off the direct list of the Lorillard Company in the period from the first of June, 1921, to the end of 1921, against whom complaints had been made by your jobber customers by your own men, which discontinued jobbers were investigated and reported on?

A. Not many.

Q. How many were there?

A. The number I could not state.

Q. Can you tell us approximately?

A. As a guess I would say not more than 15 or 20.

1162 Q. When Mr. Eberbach and Mr. Krull visited your place of business in 1921, did you know at that time that they were officers of an association of wholesale tobacco dealers in Philadelphia?

A. I did not know that they were officers.

Q. Had you heard that they were connected in any way with the tobacco association in Philadelphia?

A. Oh, I had heard that they were men interested in that movement prominently.

Q. Did you discuss the movement with them?

A. I probably did.

Q. The chances are that you did, aren't they?

A. Most likely.

Q. How often in the past four years has Mr. Krull and Mr. Eberlach called upon you in New York?

A. I do not recall but the one visit. There may have been others, but I do not recall them.

Q. But there is only one which you now can recall, and that I suppose is because it was unusual that the two of them should call together?

A. Yes. They do not generally call that way.

Q. And you spoke of the movement by which jobbers were to get better prices for your products?

A. Yes, sir.

Q. And did they discuss with you conditions in Philadelphia?

A. Most likely.

Q. And did they tell you what elements seemed to operate against the movement in Philadelphia?

A. Probably so, but as I recall the movement seemed to be quite general, and there was very little opposition to it, and in Philadelphia any specific opposition I do not recall.

Q. Do you remember that they suggested to you the names of any Philadelphia jobbers who were retarding the movement?

A. No; I do not.

Q. Did they discuss at all with you the activities of Charles Syder, one of your customers?

A. I do not think so. I think the information about Mr. Syder all came from our men over there.

Q. Do you know where your men got their information from?

A. No, sir.

Q. From some other jobber, so far as you know?

A. Yes, sir.

Q. Your men of course reported to you about Mr. Syder, did they not?

A. Yes, sir.

Q. What did they say to you? What did they report to you about Mr. Syder?

A. They reported that Mr. Syder was selling goods at prices, at ridiculously low prices, almost cost, which afterwards was confirmed by Mr. Syder himself to me, and upon that information I looked up Mr. Syder's account; in fact, that was the first time that I knew I had that account over there, and I looked it up and found that he had been buying only a few hundred dollars' worth a year, and

his business—I think they reported it the first month—and his business went up, as I recall, to a point that was more in one month than he had bought the previous year, and from knowing the conditions in Philadelphia as well as I did I knew that that was not for our benefit.

1164 Q. That was not for your benefit because of the reasons here you have been giving right along; that is, you felt that the prices he was allowing to his trade would make your customers or distributors disinterested in handling your goods?

A. I felt this, that Mr. Syder could have but one motive, and that was to benefit Syder, and he was using our products to benefit his own products, or he was preparing to get a lot of goods and maybe not pay for them.

Q. You did not worry about Mr. Syder's not paying for your goods, did you?

A. Not after I looked into it, because I found out that he had quite a bit of money, but that was the first thought that came into my mind.

Q. But you did not discontinue selling to Mr. Syder because you were afraid he was not going to pay for what he bought, did you?

A. No; not after I investigated further.

Q. But you did investigate before you cut him off?

A. Certainly.

Q. The way that you found out Mr. Syder was selling on account of his own interest was I assume that he was selling your goods at a pretty high discount from list price?

A. Yes, sir.

Q. He was giving a discount higher or greater than the majority of your other customers in Philadelphia were giving?

A. Put it this way. He was giving a discount that did not assure him the cost of doing the business.

Q. I would like to put it my own way, if you please, and I would like to have you answer my question. He was giving a discount which was greater than the discount you found was being allowed by your other customers in Philadelphia?

A. Yes, sir.

Q. That you thought to be injurious to your own business?

A. Yes, sir; because I knew the discounts over there were so close that it always has been a marvelous thing to me how they could live at all.

Q. They have been giving as much as ten per cent off list to some of their customers, some of the jobbers have been doing that for the last 8, 9, or 10 years, haven't they?

A. In some instances, some individual instances; yes.

Q. And still making what appears to be a good living?

A. I do not think they are making much of a living, if you would see how they live.

Q. Did you suggest or tell to Mr. Eberbach and Mr. Krull, or either of them, the attitude of the Lorillard Company when either

or both of those gentlemen suggested to you at this conference in New York the things that were retarding the movement which you describe in Philadelphia?

A. I do not know that I did.

Q. You won't say, however, that you did not?

A. No.

Q. The chances are, Mr. Ball, aren't they, that you did tell Mr. Eberbach and Mr. Krull that you would refuse to continue selling to anybody in Philadelphia?

A. That, I know, I did not tell them.

Q. You know you did not tell them that?

A. Yes.

Q. What makes you so positive about that?

1166 A. I would not be so foolish as to tell any jobber that we were going to cut another jobber off, because it was none of his business. That is our business alone.

Q. Did these gentlemen go so far as to suggest to you that you cut off anybody?

A. I would not say that they did. They may have. Those suggestions are very common.

Q. Do you think that they suggested to you that you cut off Mr. Syder?

A. I do not know that they did.

Q. Did they tell you that Mr. Syder was selling to sub-jobbers in Philadelphia while they were not?

A. I do not recall that they did.

Q. Did they tell you the discounts that Mr. Syder was reported to be giving to his trade?

A. I do not know that they did.

Q. You won't say that they did not?

A. It may seem strange to you that I do not recall anything about that conversation, but the reason is I have been hearing it for so many years, it went in one ear and out the other. If it had come from some other point I would doubtless have been more impressed with the complaint.

Q. Mr. Ball, you said on your direct examination that you discussed with Mr. Krull and Mr. Eberbach general business conditions, and that they brought up their not making any money. Do you remember that testimony?

A. Along those lines.

Q. Now did they tell you why they were not making money?

A. I do not think so, but that answer is evident.

Q. You said on your direct examination also that Mr. Krull 1167 and Mr. Eberbach discussed attempts to make a living profit.

Will you tell us what that discussion was you had with them on making a living profit?

A. It was only a general discussion. Specifically, I could not give you any figures.

Q. Was this interview which Mr. Eberbach and Mr. Krull had with you before or after the issuance of your circulars known as the Lorillard Company's Exhibits A to E in this case?

A. I do not know.

Q. As far as you can now recollect, it may have been after?

A. And it may have been before.

Q. How long after this visit that Mr. Eberbach and Mr. Krull made to you did you cut off Mr. Syder from the direct list of your customers?

A. I do not know. It may have been before.

Mr. CALDWELL. One moment.

The WITNESS. I do not know.

Q. You do not remember whether this visit of Mr. Eberbach and Mr. Krull was before or after you cut of Mr. Seider?

A. No, sir; I do not; but I do know that we did not cut of Mr. Seider on account of Mr. Eberbach's and Mr. Krull's visit to us, if it was prior to that time.

By Mr. CALDWELL:

Q. What do you mean—that the visit was prior or the cutting off was prior?

A. That the visit was prior to our cutting off, for the reason, as I have said many times, that we did not act on complaints of jobbers.

1168 By Mr. SMITH:

Q. You would cut off anybody because you want to cut them off?

A. Because we think it is good business and justified.

Q. In some cases you cut off a man because you think it is not good business to continue selling him, when that man or that customer has been complained against by some of your other customers?

A. That customer may have been at some time complained against; but he is not cut off for that reason. The customers are cut off for many reasons.

Q. But there are cases and were cases, as you testified, in the latter part of 1921—I will say the last half of 1921—when you did cut off some of your jobbers who had been complained against by your other customers?

A. Yes, sir.

Q. When you said on your direct examination that no one of your company, so far as you knew, assisted in the organization of any association, I suppose you are qualifying now that answer by saying that your letter to Mr. Fennell and your letter to the Janszen Grocery Company, known, respectively, as Exhibits 70 and 71, were meant by you to suggest to those firms that the jobbers of Cincinnati hold these conferences that you have mentioned in your previous answers; is that correct?

A. I do not think you have included all of that question.

(The question last above recorded was repeated by the reporter.)

1160 A. (Continuing.) In the fore part of your question you refer to the organization. Our suggestion in no wise was meant to convey that it was our desire that we should join any organization. All we desired was that they cooperate with a movement that we felt was for the benefit of our business.

Q. You said, too, that no committee representing themselves as a committee called on you. Jobbers may have called on you, who, so far as you knew, were members of some committee of different associations. Is not that correct?

Mr. CALDWELL. I object to that. I object to who, as far as he knew, were committees. How could he know they were committees?

Mr. SMITH. How could he testify that no committee called upon him?

Mr. CALDWELL. Unless they stated they were a committee.

Mr. SMITH. There may have been committees without so stating.

Mr. CALDWELL. That is a different question.

(The question was thereupon repeated by the reporter.)

Examiner McCORKLE. Answer the question.

A. They may have been members of a committee, but at not time do I recall that it was ever represented to me as such.

Q. You spoke on your direct examination of jobbers who 1170 were formerly exclusive tobacco jobbers, but were now handling side lines. How many jobbers would you say there are in the United States to-day buying direct from your company and possibly some others who handle tobacco?

A. Today?

Q. Yes, sir.

A. Not a great many.

Q. Well, I asked you how many there were, and give us the number if you know?

A. I could not possibly give you the number.

Q. How many are there in Philadelphia who handle nothing but tobacco?

A. Today not a great many.

Q. Well, how many are those?

A. I could not possibly give you the number.

Q. How many tobacco jobbers in Cincinnati buying directly from you handle only tobacco and cigarettes and tobacco products?

A. Not a great many.

Q. How many are they?

A. I could not give you the number.

Q. Did I understand you to say previously that the J. B. Moos Company was in your opinion the largest Cincinnati jobber?

A. Yes, sir.

Q. Do they handle anything besides tobacco products and similar lines or related lines?

A. I think they do handle other things today.

Q. What do they handle besides tobacco?

A. I could not testify, but I would say chewing gum, at least, is one item, and possibly candy, as most of the jobbers seem to putting in candy.

Q. You do not know, however, as a matter of fact, that the J. B. Moos Company handles candy?

A. No, sir.

1171 Q. Henry Straus is another large jobber of Cincinnati; isn't that correct?

A. Yes, sir.

Q. Isn't it correct that Henry Straus handles only tobaccos and candy and related products, such as pipes, smoking utensils and equipment?

A. I would say that he handled other things.

Q. You do not know however?

A. No, sir.

Q. You do know Mr. Fennell of Cincinnati, do you not?

A. Yes, sir.

Q. Does he handle anything besides tobaccos, cigarettes and tobacco products?

A. I would say he does, although I do not know.

Q. Do you know I. Kielson Sons of Cincinnati?

A. Yes, sir.

Q. Do they handle anything besides cigarettes and other tobacco products?

A. I could not say positively, but I rather think they do.

Q. But you do not know whether they do or not?

A. No, sir.

Q. Most of the wholesale grocery houses in the United States handle some tobacco products, don't they?

A. In the eastern section of the country there are many wholesale grocers that handle no tobaccos whatever. When you get west of the Allegheny Mountains and south of the Pennsylvania line, most of the wholesale grocers handle tobaccos.

Examiner McCORMICK. We will take a recess now until 1:00 o'clock.

(Whereupon, at 12:00 o'clock noon, a recess was taken until 1:00 o'clock p. m., of the same day.)

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AFTER RECESS

The hearing was resumed at 1:00 o'clock p. m., at the expiration of the recess.

DAVID H. BALL, the witness on the stand at the taking of the recess, resumed the stand and testified further as follows:

By Mr. SMITH:

Q. You spoke on your direct examination of taxes on tobacco products. Those taxes that you spoke of are taxes paid by the manufacturer to the Government, aren't they?

A. Yes, sir.

Q. The jobber, of course, does not pay any of those taxes that you spoke of on your direct examination?

A. No, sir.

Q. Did I understand you to say that the conditions in the tobacco business were booming in the early part of 1920?

A. The boom had commenced to subside in 1920. It was most effective, and it commenced about September, 1920.

Q. That is when the boom stopped?

A. No. That is when the intense demoralization commenced.

Q. How long in 1920 did the boom in tobacco continue?

A. From my recollection, not very long.

Q. But what you term as a "demoralization" commenced in 1173 1920 and ended about September, 1920?

A. It seemed to reach a very crucial stage.

Q. How long prior to 1920 had the tobacco business—that is, the selling end of it—been booming?

A. Well, by booming I mean the conditions during the war. Prior to the war there had not been much change in the tobacco business to my knowledge for the previous ten or fifteen years.

Q. You would say, then, that the period commencing with about September, 1920, was so different from the period for the ten or fifteen years previous that it was very marked?

A. Yes, sir.

Q. Prior to September, 1920, there had not been much change in the tobacco business or its profits?

A. Well, the profits during the war for the jobber were somewhat greater than they were prior to the war.

Q. That is, you mean to say that the amount of money that the jobber made during the war was greater than the amount of money he made prior to the war and since the war?

A. Yes, sir.

Q. The discount allowed by you on your cigarettes and tobaccos of 10 and an additional 2 per cent has been in effect for a long time, hasn't it?

A. That is, on our tobaccos, I think it has approximately been about eleven years from date, and cigarettes not quite so long. We continued our cigarettes on a flat basis for a couple of years. We started that discount on tobaccos about December 1, 1911, and about two years later we added cigarettes.

1174 Q. Prior to September, 1920, different jobbers in the same community or serving the same section sold your products at different rate of discount, from list prices, didn't they?

A. Yes, sir.

Q. That is, there was not any uniformity about the discounts that jobbers were allowing prior to September, 1920?

A. There never has been any uniformity in the prices at which the jobbers sold, but it was more uniform prior to the war, and it was still more uniform during the war, than it was subsequent to 1920. Conditions never reached the crucial time that they did in September, 1920.

Q. Do you know what the greatest discounts were that were being allowed by your jobbers in the Cincinnati territory prior to September, 1920?

A. No, sir.

Q. Do you know in a general way the range of discounts being allowed by your jobbers serving the Cincinnati territory prior to September, 1920?

A. No, sir. We had not any occasion to look into those matters.

Q. They may have been giving 4, 5, 6, 7, and 8 per cent off list, so far as you know?

A. They may have.

Q. And if I asked you the same question regarding other territories would your answers be the same as with respect to the Cincinnati jobbers?

A. As a general thing; yes; but there were some sections where the prices were more uniform than others.

Q. Which were those sections where the prices were more uniform than in others prior to September, 1920?

A. I would answer that in a general way by saying away from the large centers.

Q. And what were the discounts off your list prices that the jobbers were allowing in those places where rates of discount were more uniform?

A. In many places they sold at our list price.

Q. The list price, less 2 per cent?

A. By list price I mean list price less 2 per cent for cash.

Q. All throughout your testimony, where you have spoken of list price, you mean list price less 2 per cent for cash?

A. Yes, sir.

Q. Were there other places where there were almost uniform discount rates, where jobbers were giving higher discounts than 2 per cent off for cash?

A. Well, I could not say that they were uniform, but they were generally about the same.

Q. I ask you whether there were places where there were almost uniform discounts being allowed by your jobbers, where the discounts were greater than 2 per cent off for cash within ten days?

A. In many places there were.

Q. And that was not only to the sub-jobbing trade, but to the retail trade in those places?

A. Yes, sir.

Q. Do you remember the reinstatement of Charles Seider, of Philadelphia, on your direct list in October of 1921.

A. Well, in a general way I do.

Q. Did you have anything to do with putting him back on the direct list?

A. It is customary, when a man is to be put on the list, for 1176 two vice presidents to O. K. the recommendation of the sales manager or department man, and I was one of them that O. K'd it.

Q. What led you to reinstate Charles Seider on the direct list of your company?

A. The statement of our men that in their opinion it would no longer prove injurious to sell Mr. Seider.

Q. That is, you were satisfied from the reports of your men that Mr. Seider no longer gave such rates of discount as would disturb your other customers in his territory. Is that correct?

A. Yes, sir.

Q. Who gave you this information regarding Mr. Seider upon which you acted?

A. I do not recall the man, but it was one of our head salesmen in the Philadelphia territory.

Q. What did he report to you?

A. I have just answered that question.

Q. Well, what did he say to you—did he report to you orally or in writing?

A. I imagine it was on one of our regular reports.

Q. You mean a written report?

A. Yes, sir.

Q. You do not have that report with you today, do you?

A. No, sir.

Q. Did this man who reported to you report to you the basis or reason for his conclusion that Mr. Seider would no longer conduct his business to the injury of your company?

A. I do not imagine he did.

Q. He probably made the statement without giving reasons; is that what you think?

A. Yes, sir.

1177 Q. Was this occasion of reinstating Mr. Seider the result of an investigation commenced at your own initiative, or was the investigation conducted at the request of Mr. Seider?

A. I cannot tell you exactly, but usually an investigation is made and a report is sent in after a man has made application, and I imagine Mr. Seider made application to our man to purchase our goods direct, and that is what again brought up the question.

Q. Is there any difference between a sale by the Lorillard Company of its cigars and the sale by the Lorillard Company of its cigarettes and other tobaccos?

A. Yes, sir.

Q. There is a difference with respect to the extent of the use of the list price, isn't there?

A. The cigars are sold on what we call a controlled basis.

Q. What do you mean by that?

A. By that I mean that we sell one distributor in a given territory that brand only. That has been the custom in the cigar business for many years.

Q. And you sell to a jobber in a given community, and he is the only jobber who handles that particular brand of cigar in that community?

A. Yes, sir.

Q. And then he resells to the retailer, who resells, of course, to the ultimate consumer?

A. Yes, sir.

Q. Now, you have been examined and you have testified as to the application of a list price in the sale of tobaccos and cigarettes and other tobacco products. Will you describe to us the application of the list price of cigars made and sold by your company, in so far as that list price concerns the price which the user pays for the cigars which he buys, and in so far also as it concerns the price at which the retailer buys?

A. I am not fully posted on our cigar business, because I do not have anything to do with it, but our cigars are sold at a price less a discount.

Q. That is, they are sold by you to the distributor or jobber at a price less the discount?

A. Yes, sir. Now, there is a difference between what we term "cigars" and "little cigars." Little cigars and cheroots come under the classification of tobaccos. I am speaking of the cigars such as our brand of Muriel. Those cigars are sold at a price to the jobber, and in nearly all instances that jobber sells those cigars at the price that we sell them, and retains the trade allowance for his profit. That is as near as I can answer that question in a general way.

Q. In other words, you sell to the jobber at your list price less a discount; the jobber sells to the retailer on the basis of a list price less the discount. Is that correct?

A. He does not generally give a discount other than the cash discount on the cigars. He generally sells at the list price.

Q. He sells at the list price of the cigars less some discount, however. Isn't it list less the 2 per cent?

A. Two per cent cash, the cash discount only.

Q. That list price, which is the basic price in cigars, bears what relation if any to the price at which the cigar is sold to the consumer or user of the cigar?

A. Well, answering that question in a general way, I would say that the profit of the jobber on cigars ranges from 12½ to 15 or 16 per cent probably, and the retail dealer makes a larger percentage of profit on the cigars than he does on tobaccos. We have always figured 20 per cent profit to the retail dealer on his selling price as a fair margin of profit, and the general cigar business figures about 33½ per cent profit to the retail dealer.

Q. What I am trying to get at is this proposition: What relation there is between the price paid by a purchaser of a cigar at a cigar store and the list price charged by the manufacturer of the cigars in the first instance to the jobber. Does the retailer sell to the consumer on the basis of that list price?

A. Generally.

Q. You have testified that you had no connection with any of the tobacco jobbers of Cincinnati as a company?

A. Other than doing business with them.

Q. And the same, I suppose, holds good with the jobbers in Philadelphia?

A. Yes, sir.

Q. Have you made loans to any of the Cincinnati jobbers who are respondents in this case—loans of money?

A. Not to my knowledge.

Q. Has your company loaned money to any of your Philadelphia jobber customers in the last two years?

A. Not to my knowledge.

Q. Do you know whether one or more of your Philadelphia jobber customers are indebted to you at the present time for advances made by your company to them, or to some of them?

A. Not to my knowledge.

Q. Do you know whether at the present time some one or more of the Cincinnati jobber customers of yours are indebted to your company for money loaned by your company to such jobbers?

A. Not to my knowledge.

Q. Do you mean that there may have been such advances made and still unpaid that you do not know of?

A. Possibly, but very improbably.

Q. Do you employ in your company a man by the name of Bendall?

A. Yes, sir.

Q. What is his territory?

A. During 1921 and 1922 he was looking after the cigarette end of the business in a variety of territories. He was switched about considerably, but at times he was in Philadelphia and other sections of the East. I do not think Mr. Bendall ever went out of New England, New York, and Pennsylvania.

Q. Was he a salesman or did he have a different title from "salesman"?

A. Yes; he had a different title from a salesman. He would be regarded more as a department manager for cigarette business.

Q. These circulars issued by the Lorillard Company, known as Exhibits A to E, both inclusive, where the 10 per cent discount is mentioned, have no application, have they, Mr. Ball, to the discounts allowed by your company on cigars made by your company?

A. No, sir.

Q. So that cigars are altogether outside of the meaning of these circulars?

A. Yes, sir; handled as a separate business entirely.

Q. Is the business which you call the little-cigar business embraced within the classification of cigarettes, or is that independent?

A. No, sir. They are generally alluded to as cigarettes and little cigars.

Q. Do these circulars of the Lorillard Company, known as Lorillard Exhibits A to E, both inclusive, have any application to cigars?

A. Yes, sir. I explained it before, that little cigars and cheroots came under the same classification as cigarettes and tobaccos, as far as the trade allowance was concerned.

Q. What tobacco products are embraced in the jurisdiction of what you term your "scrap department"?

A. Scrap tobaccos.

Q. Will you tell us what they are, for the benefit of this record?

A. You mean the names of the brands?

Q. The nature of the brands, and then their names, if you please?

A. Our principal scrap brands are Beech-Nut, Honest, Polar Bear, Pan Handle, Old Nut, Bag Pipe, Open Book, and Havana Blossoms.

Q. Are those all chewing tobaccos, or are some of them smoking tobaccos?

A. They in rare instances are smoked, but practically 95 to 99 per cent of them are chewed.

Q. Are there any other products that come within the classification of the scrap department?

A. No, sir.

1182 Q. Scrap tobaccos were meant to be included within the meaning of these circulars, known as Exhibits A to E, inclusive?

A. Yes, sir.

Q. Cigarettes also were intended to be included within the meaning of those circulars?

A. Yes, sir.

Q. Are there any other tobacco products that were intended to be included within the meaning of these circulars?

A. All of our tobaccos.

Q. All of your tobaccos?

A. Yes, sir.

Q. As distinguished from your cigars?

A. Yes, sir. Would you mind crossing out that last brand, Havana Blossoms, for this reason? Havana Blossoms, while a scrap tobacco, was not handled by the scrap department. It was looked after by the plug and smoking department, and I think it referred to the scrap department.

Q. I think the reporter has the explanation of that.

A. I wanted to make it as clear as I could, and as accurate as possible.

Colloquy between examiner and counsel

Mr. SMITH. That is all.

Mr. CALDWELL. I have no redirect examination. We are anxious to get away and close the case. The Lorillard Company closes its case.

Examiner McCORKLE. Does this close your case, Mr. Smith?

Mr. SMITH. It does in 909.

Examiner McCORKLE. And this closes the case for the respondents?

Mr. CALDWELL. Yes, sir. I respectfully move to dismiss the complaint now that the case has been closed upon each and
1183 every ground upon which I moved to dismiss the complaint at the opening and at the time that the commission closed its case.

Examiner McCORKLE. Note the motion of respondent's counsel, and the same is overruled and referred to the commission for its decision.

Mr. CALDWELL. And I take an exception separately upon each ground.

Mr. SMITH. Let me have myself understood as to this 909. Mr. Caldwell and I have been working upon a proposition to consolidate with the proof in this case, the proof in Docket 908, and I have also an addition which I desire to make to this record at the request of Mr. Caldwell. Some place or other in the record of the proceedings in this case there was offered by Mr. Caldwell a copy of a letter written by the Reynolds Company to Henry Straus of Cincinnati, Ohio. Objection was made by me to the admissibility of that letter, and my recollection is that the record will show that my objection was sustained. Although I still maintain that this letter is not admissible or relevant to the issues in this proceeding, I agreed with Mr. Caldwell in New York City that a copy of this
1184 letter might go in, provided a copy of the letter written to the Reynolds Company by Mr. Cruse of Henry Straus, which brought forth the reply from the Reynolds Company, should also be in evidence. I therefore present these, Mr. Examiner:

First, a letter date August 29, 1921, from J. A. Cruse to Mr. Bowman Gray, vice president of the R. J. Reynolds Tobacco Company, Winston-Salem, North Carolina, and ask that this letter be marked "Commission's Exhibit No. 126." I also offer in evidence the reply from the R. J. Reynolds Tobacco Company, dated November 1, 1921, to Henry Straus, and ask that this letter be marked "Commission's Exhibit No. 127."

Examiner McCORKLE. All right, gentlemen. With that agreement between you, any ruling that the examiner has made either sustaining the objection or otherwise will be withdrawn and the letters admitted.

(The papers referred to, so offered and identified, were received in evidence, marked, respectively, "Commission's Exhibits Nos. 126 and 127," and are forwarded herewith.)

Mr. SMITH. Mr. Examiner, Mr. Caldwell and I have agreed, and I suggest and move that the record show the agreement, and therefore ask that the agreement be made a part of this record, that the record of the proceeding in this case by the commission against the Tobacco Products Corporation and others, Docket No. 908, shall, after the following changes have been made in the record of 1185 the proceedings under 908, be a part of the record in this case, Docket No. 909. The changes to be made in the record in Docket No. 908 for the purpose of making that record, when corrected, a part of the record in this case, Docket 909, are as follows:

1. On page 1 change the docket number to 909.
2. Strike out the appearance on page 1 of Messrs. Shelton, Ferguson, Walsh, and Fuller.
3. Make a new index of witnesses on page 2, eliminating the names of Ferguson and Bales.
4. Make a new index to exhibits as will be required in following out subsequent changes herein suggested.
5. Strike out from page 4 everything except the word "proceedings," capitalized, at the top of the page. Have the record show Examiner McCorkle to say on the second from the last line of page 4 "Call your first witness"; let the statement of the swearing of Cruse remain.
6. On page 13 substitute the name Caldwell for Shelton, and substitute P. Lorillard Co. for Tobacco Products Co.
7. On page 14 substitute the name Caldwell for Shelton.
8. On page 20 substitute the name Caldwell for Shelton wherever the latter appears.
9. On page 24 substitute the name Caldwell for Shelton 1186 wherever the latter appears and substitute P. Lorillard Co. for Tobacco Products Co. and Falk Tobacco Co.
10. On page 29 eliminate the following testimony, viz: Beginning with the last question commencing on page 29 and concluding with the answer to the next to the last question on page 30.
11. Eliminate page 33, page 34, and all of page 35 except the first question and answer on page 35; eliminate page 36, page 37, and that part of page 38 to the question by Mr. Smith on the 9th line of page 38.
12. Eliminate page 39.
13. Eliminate first three lines of page 40.
14. Eliminate all of page 40 following the answer, "No, sir; I do not," which answer appears on line 17 of page 40. (This in effect will make the record show questions and answers from the first question on the page to the answer on the 17th line and the statement of the examiner fixing the adjournment may be shown in fixing the record.)
15. Eliminate all of page 41 except the words, "Afternoon session."
16. Eliminate all of page 42.
17. Eliminate all of page 43.

18. Eliminate all of page 44 to the question on the 4th from the last line, commencing as follows: "Mr. Cruse, did you write
• • •?"

1187 19. Substitute name Caldwell for Shelton on page 45.

20. Make the same substitution on page 46.

21. Substitute the name Caldwell for Shelton on the 4th from the last line on page 53 and eliminate the last four lines on that page.

22. Between the second question asked by Mr. Smith, on page 54, have the record show as follows:

"CALDWELL. Objected to as not binding on P. Lorillard Co.

"McCORMICK. Overruled.

"CALDWELL. Exception."

23. After the last question on page 54 make the additions suggested in 22 hereof.

24. Substitute the name Caldwell for Shelton on page 55.

25. On page 58, following the question commencing on line 19, make the addition suggested in 22 hereof.

26. Substitute the name Caldwell for Shelton and P. Lorillard Co. for Tobacco Products Corp. in the last four lines of page 63.

27. On page 76, substitute the name Caldwell for Shelton in the 3d from the last line and in the last line on page 76, and substitute the name P. Lorillard Co. for Tobacco Products Corp. in the next to the last and second from the last line of that page, and change the word "manufacturers" in the 3d from the last line of that page where it appears the second time to the singular.

28. Substitute the name Caldwell for Shelton where the same appears on page 77.

29. Substitute the name Caldwell for Shelton on page 90.

30. On page 94 substitute the name Caldwell for the names Shelton and Ferguson, and substitute the name P. Lorillard Co. for Tobacco Products Co. and Falk Tobacco Co.

31. Substitute the name Caldwell for Shelton on page 98.

32. Substitute the name Caldwell for Shelton on page 118 and make the same substitution on page 120.

33. Correct the answer "Give and two" on the 2th line of page 137 to read, "Five and two."

34. Correct the word "Technical" on line 5 of page 138 to the word "practical."

35. After the last question on page 139 make the following addition:

"CALDWELL. I object to any conversations between Harriman and this witness as hearsay, incompetent, and as not binding on P. Lorillard Co. and ask that this objection apply to all of the testimony of this witness without being obliged to repeat the objection as the questions are asked.

"EXAMINER McCORMICK. Objection overruled.

1189 "CALDWELL. Exception.

"McCORMICK. Mr. Caldwell's objection to questions along the line need not be repeated."

36. At the end of page 145 make the following additions:

"Mr. CALDWELL. I move to strike out all of the testimony of this witness for the same reasons on which I objected to its introduction.

"Examiner McCORKLE. Motion overruled.

"CALDWELL. Exception."

37. Substitute the name Caldwell for Shelton wherever it appears in the testimony of Witness Fennell, particularly pages 152-156.

38. Eliminate the testimony of the witness Ferguson commencing on page 161 and terminating with the 8th line of page 170.

39. Eliminate the statement by Mr. Smith on the 4th and 5th lines of page 171 and eliminate the statement of Examiner McCorkle on the 6th line of the same page.

40. On page 180 substitute the name Caldwell for Shelton and substitute the name Caldwell for Schulten in the 10th line of page 181.

41. Make the following addition to page 182, following the 3d line of that page:

"Mr. CALDWELL. I move to strike out all testimony of this witness as to conversations with Mr. Bickett, purported to be what Bickett heard from Cruse and repeated to witness as hearsay, incompetent, and not binding on P. Lorillard Co.

"Examiner McCORKLE. Motion denied.

"Mr. CALDWELL. Exception."

42. Eliminate the testimony of Witness Bales, commencing on page 188 and continue elimination to and including the statement by Examiner McCorkle on the 7th from the last line of page 200.

43. On page 207 substitute the name Caldwell for Shelton and P. Lorillard Co. for Tobacco Products Corp. and Falk Tobacco Co.

44. Eliminate page 208 and all subsequent pages and make the record show after 207 an adjournment to Monday, November 13th, at 10 a. m.

This agreement, Mr. Examiner, is meant to include, and does include, the proof and admissions of the various exhibits in evidence in Docket No. 908 in so far as those exhibits were admitted and proved in those parts of Docket No. 908, which, by the corrections hereinbefore suggested, will have been shown to have been introduced and approved in that part of the record in Docket No. 908 which shall, according to this agreement, become and be a part of the record in this case, Docket No. 909.

Mr. CALDWELL. I suggest that this is in accordance with the 1191 agreement which I had made with Mr. Smith, and it is agreed upon.

Examiner McCORKLE. No further testimony being desired to be introduced by the commission or by the respondents, the case is closed. After the examiner makes his report to the commission the attorneys for the commission will have 30 days thereafter within which to file briefs and the respondents' attorneys 40 days from the receipt of the examiner's report to file briefs. I call your attention to the commission's rule that requires any exceptions to the exam-

iner's report to be made within 10 days after its receipt. Those exceptions later ought to be embodied in any briefs that the attorneys file in the case.

Mr. SMITH. Now in this case I am going to ask an adjournment to Philadelphia at ten o'clock Tuesday morning, December 19th, at room 318 of the Federal Building, for the purpose of showing the extent of the business and the corporate organization or partnership constituency of some of the respondent jobbers, particularly those who were not represented by Mr. Taulane. There won't be offered there any testimony that will directly affect the Lorillard Company or the American Tobacco Company or any of the other respondents. With that understanding or with the understanding which is to be derived from my statement, this case against the Lorillard Company is closed or rested in behalf of the commission.

Mr. CALDWELL. I now renew the motions which I made at the opening of the case and ask that the complaint be dismissed, and make a motion to dismiss the complaint upon each ground made at the opening of the case, and ask that each ground be considered separately as though repeated here.

Examiner McCORKLE. The motion is denied.

Mr. CALDWELL. And I take an exception on each ground.

Examiner McCORKLE. You have no further testimony on the part of the respondents?

Mr. CALDWELL. No, sir.

Examiner McCORKLE. And as stated by counsel for the commission and respondents, I close this case as to the respondent, the P. Lorillard Company, the case having been previously closed as to the American Tobacco Company and as to certain of the jobber respondents in this case, and is adjourned to Philadelphia, room No. 318, Federal Building, at 10 o'clock on December 19, 1922.

(Whereupon, at 2.10 o'clock p. m., an adjournment was taken until 10.00 o'clock p. m., December 19, 1922, at room 318, Federal Building, Philadelphia, Pennsylvania.)

BEFORE THE FEDERAL TRADE COMMISSION

FEDERAL TRADE COMMISSION

VS.

WHOLESALE TOBACCO AND CIGAR DEALERS' ASSOCIATION of Philadelphia and others

Docket No. 886

PHILADELPHIA, PA., December 19, 1922.

Met pursuant to notice, 10.00 o'clock a. m.

Before: George McCorkle, examiner.

Appearances: Edwin B. Haas and Edward L. Smith for the Federal Trade Commission.

(No counsel appearing for the respondents.)

PROCEEDINGS

Examiner McCORKLE. The case of the Federal Trade Commission against the Wholesale Tobacco and Cigar Dealers' Association of Philadelphia and others is set for hearing at this time and place, pursuant to notice and pursuant also to an order of the examiner fixing an adjournment to this time and place. Respondents, Yahn & McDonald Company, John Wagner & Sons, M. J. Dalton Company, and Baum & Neely, Incorporated, are not represented by counsel.

1194 W. R. TAYLOR was thereupon called as a witness, and after being duly sworn testified as follows:

By Examiner McCORKLE:

Q. What is your full name?

A. W. R. Taylor.

Direct examination by Mr. HAAS:

Q. Where do you live, Mr. Taylor?

A. 11th & Pine Streets.

Q. Philadelphia?

A. Philadelphia.

Q. How long have you lived in Philadelphia?

A. Twenty-five to thirty years; yes, more than 30 years.

Q. What is your full name?

A. William R. Taylor.

Q. What is your business?

A. Vice president of the M. J. Dalton Company.

Q. Is the M. J. Dalton Company incorporated?

A. Yes, sir; it is a corporation.

Q. Who are the officers of the corporation?

A. W. R. Taylor, vice president; M. R. King, secretary; Jennie F. Dalton was president; M. R. King and Jennie F. Dalton are now deceased.

Q. Where was the M. J. Dalton Company incorporated?

A. Pennsylvania; it is a Pennsylvania corporation.

Q. Where is the place of business?

A. 501 Chestnut Street.

Q. Philadelphia?

A. Philadelphia.

1195 Q. And do you have any branches?

A. Yes; 111 South 13th Street, Philadelphia.

Q. What do you deal in?

A. Deal in cigars, cigarettes, and tobacco.

Q. Do you buy direct from the large manufacturers?

A. Yes.

Q. What are the names of the companies from whom you buy?

A. Cigars?

Q. Cigars, cigarettes, and tobacco.

A. Tobacco I buy from Falk & Company; cigarettes from P. Lorillard; American Tobacco Company; W. Duke & Sons Co., and Tobacco Products Corporation. I think that covers it. Liggett & Myers we do not buy from.

Q. Where do you resell your tobacco and cigarettes?

A. In Philadelphia, principally. We have no traveling men.

Q. Do you sell any of your commodities in New Jersey?

A. New Jersey; yes; orders come in.

Q. Do you sell in any other State besides Pennsylvania and New Jersey?

A. No; I could not answer that off-hand. We would sell if we received an order; off-hand I don't think we sell cigarettes outside.

Q. How do you sell your stuff?

A. How do you mean—wholesale?

Q. Yes. Do you sell wholesale?

A. Wholesale and retail. Retail is our principal business.

Q. Do you employ salesmen?

A. Salesmen in the store.

1196 Q. Do you employ any traveling salesmen?

A. No traveling salesmen.

Q. You do not employ traveling salesmen?

A. No.

Q. In selling through New Jersey, how do you fill your orders?

A. How do we fill them?

Q. Yes.

A. What do you mean by that—the shipping?

Q. Yes.

A. We send by parcel's post and by express.

Q. That is, when an order comes in, you make up a shipment here and ship it from your plant in Philadelphia to the customer?

A. Yes; that is the only place we can ship it from.

Q. In other words, you ship the goods from Philadelphia to New Jersey to your customers there who give you the orders?

A. Yes, sir.

Q. Do the orders come to you by mail from there?

A. Not all. If I am in Atlantic City, New Jersey, where I am in the summer, I take the orders myself. I never have a salesman there.

Q. Those mail orders and these other orders you speak of are accepted by you in Philadelphia?

A. Oh, yes.

Q. You were a member of the Wholesale Tobacco and Cigar Dealers' Association of Philadelphia?

A. I was.

Q. When did you join that association?

A. About six months after its organization, as near as I can remember.

1197 Q. Your corporation was a member of the Wholesale Tobacco and Cigar Dealers' Association of Philadelphia six months after its organization?

A. Yes.

Q. Your corporation was a member of that association?

A. Yes, sir.

Q. How long has the corporation been in business?

A. I could not answer that.

Q. I am referring to the M. J. Dalton Company.

A. Oh, the M. J. Dalton Company, you mean?

Q. Yes.

A. Possibly 20 years or more. In its early stages it was M. J. Dalton, and it was incorporated in this State about 20 years ago by Mr. Dalton. He is deceased a long time.

Q. How long have you been vice president of the M. J. Dalton Company?

A. Eleven years—since the death of Mr. Dalton.

JOSEPH WAGNER was thereupon recalled as a witness, and having been previously sworn testified as follows:

Direct examination by Mr. HAAS:

Q. What is your full name?

A. Joseph Wagner.

Q. And you have testified previously in this matter?

A. Yes, sir.

1198 Q. Where do you live?

A. Chestnut Hill is the post office, but I live really at Lavarock, Montgomery County, Pennsylvania.

Q. What is your business?

A. Wholesale cigar dealer and importer.

Q. You job cigars?

A. Yes, sir.

Q. And cigarettes and tobacco?

A. Yes, sir; in addition to other specialties.

Q. What firm are you connected with?

A. John Wagner & Sons.

Q. You are a respondent in this case?

A. Yes, sir.

Q. And your firm is a respondent in this case?

A. Yes, sir.

Q. Who are the partners?

A. John Wagner and myself.

Q. You are in business as John Wagner & Sons?

A. As John Wagner & Sons.

Q. For how long?

A. I should say somewhere around 30 years. My father established the business in 1847 and the name was merely changed. My brother can tell you better than I can.

Q. Where does John Wagner & Sons sell its goods?

A. Principally in Philadelphia.

Q. Do you sell any in New Jersey?

A. Not that I recall. We sell in Philadelphia and outside districts—districts around Philadelphia.

Q. Just in the State of Pennsylvania?

A. No; occasionally we send something West.

Q. Do you employ any salesmen?

A. Yes. We may have private customers in Indiana; we may have them in New Jersey or in New York City.

1199 Q. Are their orders sent in by mail to you and the goods shipped to them from Philadelphia?

A. Yes.

Q. To these different places outside Philadelphia?

A. Yes.

Q. What do you deal in?

A. We deal in cigarettes, cigars, tobacco, olive oil, coffee, teas, and specialties in the grocery line—fancy specialties.

Q. When you said a while ago you sold and accepted orders outside of Pennsylvania, you included in that your tobacco and cigarettes?

A. I should say we had very little tobacco or cigarette goods outside of the State.

Q. How much would you say outside of the State in tobacco and cigarettes?

A. Of tobacco and cigarettes outside of the State?

Q. Yes.

A. I was just trying to think, sir. I should say practically nil. Practically none at all. There would be just some case of a cigar customer who asked us to ship with the cigars a few cigarettes. I mean by that a private customer.

Q. Were those retail dealers—those customers?

A. No; they were private people.

Q. Just private people?

A. Yes; just private people.

Q. That would be just like selling retail?

A. Yes; just as if I were selling you a box of cigars, sir.

1200 JOHN WAGNER was thereupon called as a witness, and being duly sworn testified as follows:

Direct examination by Mr. HAAE:

Q. What is your full name, Mr. Wagner?

A. John Wagner.

Q. How long have you lived in Philadelphia?

A. Fifty nine years.

Q. Where do you live?

A. School Lane, Germantown, 21st ward, Philadelphia.

Q. What is your business?

A. My business at the present time is importing cigars and general foreign specialties—oils—that is, olive oil.

Q. Do you sell tobacco and cigarettes?

A. We do, sir.

Q. What is the name of your firm?

A. John Wagner & Sons.

Q. Who are the partners?

A. John and Joseph Wagner.

By Examiner McCORMICK:

Q. You are a brother of Joseph W. Wagner, who just preceded you on the witness stand?

A. Yes, sir.

Q. And you and your brother Joseph W. Wagner comprise the firm of John Wagner & Sons?

A. Yes, sir.

1201 By Mr. HAAS:

Q. And John Wagner & Sons is one of the respondents in this case?

A. Yes, sir; I understand so.

Q. And you are one of the respondents in this case?

A. Yes, sir; that is the way I understand it.

Q. Do you sell tobacco and cigarettes wholesale or retail?

A. We really do both.

Q. You sell at both wholesale and retail, cigars, tobacco and cigarettes?

A. That is in very small quantities; we have both the wholesale and retail trade. We sell wholesale and we have trade to the consumer.

Q. Have you a retail store besides your wholesale department?

A. No; only the one place.

Isadore Baum was thereupon called as a witness, and being duly sworn, testified as follows:

Direct examination by Mr. HAAS:

Q. State your full name, Mr. Baum.

A. Isadore Baum.

Q. And your address?

A. My address to-day is different from what it was before. Do you want my address at that time and my present address?

1202 Q. At that time and the present time.

A. Baum & Neely is the firm name; first at 1325 Arch Street and now at 1425 Chestnut Street.

Q. Philadelphia?

A. Philadelphia.

Q. The Corporation of Baum & Neely is one of the respondents in this case?

A. Yes, sir.

- Q. Under the laws of what State was that firm incorporated?
 A. Pennsylvania.
- Q. What is your position with that company?
 A. I was president and treasurer.
- Q. How long have you been president and treasurer?
 A. Since the beginning of the firm.
- Q. What does that corporation deal in?
 A. We job cigars. We didn't job in tobacco—we didn't deal in tobacco; only in cigars.
- Q. How long have Baum & Neely been in business?
 A. I think our corporation started in February, 1919, and we closed our business during July and August of last year.
- Q. Has it been in operation since that time?
 A. No.
- Q. Baum & Neely are incorporated?
 A. Yes.
- Q. Baum & Neely Incorporated was the name of the firm?
 A. Yes; that was the style of the concern.
- Q. Has the corporation been dissolved?
 A. Well, we went into a receivership. I don't know whether there is a legal closure of the business or not. It is in process of closure. We have been out of business since August 1 and since then the receiver has been doing the work and I don't know how he stands up to the present time.
- Q. During the operation of the business where did you sell your products?
 A. Well, our business was pretty much all in Philadelphia. We had small trade in New Jersey, which hardly amounted to anything. At our business was, I would say, 95% in Philadelphia.
- Q. How did you get your New Jersey business?
 A. Why, by mail and telephone. There wasn't any solicitation, personally, occasionally, went down and called on one or two customers. They were not sold by general solicitation. Business came in mostly through the mail and by telephone.
- Q. Were those orders accepted in Philadelphia and the goods shipped out of Philadelphia to the customers in New Jersey?
 A. Yes, sir.
- Q. They were shipped from Philadelphia to New Jersey?
 A. Yes, sir.
- Q. Who did you buy from?
 A. We bought direct from the local jobbers here. We were not direct customers of the big concerns. We bought through the local jobbers here the same as the retailers would. We had retail features and we bought cigarettes only for our retail business.
- Q. Did you buy cigars from the large manufacturers?
 A. Yes, from Tampa, New York City, etc.—different manufacturers.
- Q. Did you sell the cigars wholesale?

A. Yes, sir.

Q. Did your membership in this association have anything
1204 to do with your going into the hands of a receiver?

A. No; in fact, I resigned from the association. I think was only a member for a year; being a cigar jobber, I didn't feel I had any occasion to be connected with it. I only went in at the time—when they joined I fell in line rather—we were not tobacco jobbers and we were only cigar jobbers. I think I only paid one year's dues and then I resigned.

Q. You did handle some cigarettes and tobacco?

A. Cigarettes and tobacco?

Q. Yes.

A. Only in a retail way.

Q. Who did you buy those from?

A. Only from a local jobber. Just from local jobbers.

Q. Who were they?

A. We bought from Charles Krull, for which we paid prices the same as any other retailer would. We were not even sub-jobbers. We didn't handle tobaccos at all. We simply jobbed cigarettes. We bought the same as the retailer. We didn't handle tobacco at all. We simply jobbed cigars. We bought cigarettes and tobacco for retail sales only.

Q. What discount did Krull allow you during the time you were a member of the association?

A. I really forget. I only know when we quit we were getting 8%. The discounts at the time during our period in business varied.

Q. I mean during the time of the association.

A. They varied. When we quit business I remember our discounts on tobacco and cigarettes was 8%.

1205 Q. Did he allow you 7% from June, 1921, until October of 1921?

A. From when—June?

Q. Yes; June, 1921, to October, 1921.

A. Yes; I think he did. I don't know whether that was the period. I know there was a 7% discount at one time.

Q. From October, 1920, to June, 1921, what did Krull allow you? Wasn't it 8%?

A. I could not say positively. I have no books or records here, of course, and I can't tell you. I didn't attend to that branch of the business myself. My son attended to that. I know we had discounts of 7% and of 8%, but at different times.

Q. That was during 1920? Was that during 1920 and 1921?

A. Yes; it was during that period—1920 and 1921 and part of 1922. In that time I would say we had discounts of 7% and 8%.

Q. What discounts did you get of Mr. Krull prior to the organization of the Wholesale Tobacco & Cigar Dealers' Association?

A. I think it was 8%.

Q. Eight per cent before July, 1920, you would say?

A. Yes; I rather think that is what it was.

Q. Wouldn't you say you got as much as 10% before the organization of the association?

A. We never got 10% off.

1206 MICHAEL J. McDONNELL was thereupon called as a witness, and, being duly sworn, testified as follows:

Direct examination by Mr. HAAS:

Q. State your full name and address?

A. Michael J. McDonnell.

Q. What is your address?

A. My business address is 1311 Sansom Street, Philadelphia, which is the wholesale house.

Q. What is your position with the firm of Yahn & McDonnell?

A. President.

Q. You are president of Yahn & McDonnell?

A. Yes, sir.

Q. Is Yahn & McDonnell a corporation?

A. Yes, sir.

Q. And the corporation of Yahn & McDonnell is one of the respondents in this case?

A. Yes, sir.

Q. Under what laws were you incorporated?

A. Under the laws of the State of Pennsylvania.

Q. How long has that corporation been in existence?

A. Since January of 1914, I think.

Q. What business is the corporation of Yahn & McDonnell engaged in?

A. Wholesaling cigars—jobbing and retailing cigars and cigarettes.

Q. Do you sell cigarettes and tobacco?

A. Yes.

1207 Q. Do you sell at wholesale?

A. Cigarettes; yes; but not tobaccos.

Q. Where do you sell your goods?

A. Philadelphia, principally.

Q. Do you sell outside of Philadelphia—that is, do you sell in New Jersey?

A. No, sir; we sell cigars outside of Pennsylvania, but no cigarettes.

Q. Or tobacco?

A. No.

Q. State how the orders were filled that you received from outside of Pennsylvania.

A. I don't understand that question.

Q. You do get orders from outside of Pennsylvania?

A. Yes.

Q. How do you get those orders?

A. Sometimes by mail; we have no outside of the State representative. We have a man who goes down to Atlantic City only every once in a while.

Q. Were those orders accepted in Philadelphia and shipped from Philadelphia into the other States?

A. Yes.

Q. Your firm was a member of the Wholesale Tobacco and Cigar Dealers' Association of Philadelphia?

A. Not to my knowledge.

Q. How long have you been president of this corporation?

A. Since its incorporation. I think that was January, 1914.

Q. You have been president since that time?

A. Yes, sir.

Q. You have been engaged continuously in the tobacco business in Philadelphia since its organization?

A. Continuously; yes, sir.

Q. Do you sell at wholesale and retail?

A. Yes, sir.

1208 Q. Have you any retail stores outside of the wholesale establishment?

A. Yes, sir.

Q. How many?

A. Two at the present time.

Q. Where are they located?

A. Widener Building, Arcade, and Adelphia Hotel.

Colloquy between examiner and counsel

MR. SMITH. Mr. Examiner, the purpose of the hearing this morning is to show the corporate identity, or the character, or partnership identity of the firms of Yahn & McDonnell, John Wagner & Sons, M. J. Dalton Company, and Baum & Neely, Incorporated. The respondents in this case filed a joint answer in which they admit the corporate or partnership constituency of the firms described in the complaint in this proceeding, and all of those who signed the joint answer, and in addition to them, Murphy Brothers, of Camden, N. J., have signified on the record in this case that they intend to introduce no testimony in their defense on the allegations of the complaint, and if these firms—these four firms whose names I have just suggested as not having signed the joint answer—will also signify to you on this record that they intend to introduce no testimony in their defense (in case they feel inclined to introduce no defense) this case will be closed. None of these firms are represented by counsel, and I suggest that if you care to, Mr. Examiner, you ask these gentlemen whether they personally waive the introduction of any testimony in their own defense, and as to the others, whether the corporations of which they are officers intend to introduce testimony in defense of the allegations in the complaint. In case they do not, the case

1909 will be closed, as all of the respondents will then have signified their intention not to introduce any evidence in their defense.

The EXAMINER. Gentlemen, you have heard the statement of the counsel for the commission and I will inquire of you, therefore, if either of you intends to introduce any testimony in support of any defense you wish to make, or of the corporations which you represent, at this time? Will you please state at this time whether you desire to do so or not? If you do, you will be given an opportunity to do so. If you do not, I will close the case.

Mr. SMITH. Every opportunity will be given if anyone desires to present any defense, but we do not wish to delay the proceedings if no one wishes to do so.

Mr. JOSEPH WAGNER. May I ask you a question? Is the reply to the complaint we submitted considered as testimony?

The EXAMINER. Not unless you introduce it. Not unless you wish to make it so.

Mr. JOSEPH WAGNER. I do not like to prolong anything, as I desire to get back to my office. But I very much feel this reply to the allegations which I answered specifically should form part of the testimony on behalf of John Wagner & Sons.

EXAMINER McCORKLE. Where is your answer?

Mr. JOSEPH WAGNER. Here it is. (Witness produces copy of typewritten paper.)

EXAMINER McCORKLE. This firm, John Wagner & Sons, wishes to introduce its answer as testimony in defense and this paper will be marked as an exhibit.

1210 (Paper received in evidence and marked "Respondent's Exhibit No. 7.")

Mr. SMITH. Mr. Examiner, we object to the introduction of this copy of the answer, or subsequent proof of any of the contents of the answer as such. I make the objection so that in case there is a valid objection, that objection is on the record.

EXAMINER McCORKLE. Your answer will be received in evidence subject to the objection.

Mr. JOSEPH WAGNER. I merely ask that this be introduced as a denial.

The EXAMINER. Unless the allegations of the complaint are sustained by the evidence, it doesn't go any further.

EXAMINER McCORKLE. Gentlemen, do I understand that neither of you wish to introduce any testimony?

Yahn & McDonnell state they desire to offer no defense.

Mr. SMITH. As I understand the situation, Mr. Joseph Wagner, who is an individual respondent, desires to offer no defense as an individual, nor as a member of the firm of John Wagner & Sons. Will you find out, Mr. Examiner, whether that is Mr. Wagner's position. Will you ask them if they desire to furnish any further testimony, it being understood, of course, that the answer filed by

John Wagner & Sons will receive the consideration it is legally entitled to.

Mr. JOSEPH WAGNER. Mr. Smith, you have stated my position perfectly, sir.

1211 The EXAMINER. Then I understand John Wagner intends to introduce no testimony in his own behalf nor on behalf of the firm of John Wagner & Sons.

Mr. WAGNER. That is correct, sir.

Examiner MCCORMICK. Do I understand that Yahn & McDonnell desire to offer no testimony in defense of the allegations of the complaint?

Mr. McDONNELL. That is correct.

Mr. SMITH. I understand, Mr. Examiner, that Baum & Neely also intend to offer no testimony, and Mr. Baum is here before you and he will answer, I think, for Baum & Neely.

Mr. BAUM (of Baum & Neely). That is correct; Baum & Neely intend to offer no defense to the allegations.

Examiner MCCORMICK. The M. J. Dalton Company is here represented by Mr. Wm. R. Taylor. Does the M. J. Dalton Company intend to introduce any testimony in their defense?

Mr. TAYLOR. Nothing further than the answer—the same as the John Wagner & Sons does.

Mr. SMITH. The commission's case is closed and it is closed as to all the other respondents as the record heretofore shows, and I think therefore I shall ask you, Mr. Examiner, to order the case closed.

The EXAMINER. With this understanding, gentlemen, the case is closed; if you wish, after I file my report, you have 30 days in which to file a brief; and you have ten days in which to file exceptions to my report.

(Meeting adjourned.)

1212

COMMISSION'S EXHIBIT No. 1

MINUTE BOOK OF THE WHOLESALE TOBACCO & CIGAR DEALERS' ASSN.
OF PHILADELPHIA—ORGANIZED AUGUST FIFTH, 1920

Minutes of meeting held July 22d, 1920, in the green room, Hotel Adelphia

The first session of the Wholesale Tobacco & Cigar Dealers Association was held at the above place and date.

The meeting was called to order at 8.30 p. m., by H. Stewart Moorhead, chairman, and N. W. Mead, secretary. Mr. Moorhead gave a short talk on the value of jobbers' organization in Philadelphia, and Nelson Elertsch also spoke favorably of the project and moved that a permanent organization be formed at once but withdrew his motion. It was then unanimously agreed by a rising vote that a second meeting be held at this hotel in two weeks from the above date. A short recess was then taken to allow those present to

sign the roll of membership; 20 signed the roll. Upon reassembling a committee of five members were appointed to draft a constitution, consisting of Nelson Eberbach, James Murphy, Paul L. Brogan, Harvey D. Narrigan, and Herman J. Krull; a notification committee of five were selected as follows: William Cohen, Frank Blatt, John Eberbach, William Sheperd, and Israel Baum.

After a thoro canvass of the situation, the next meeting for the election of officers and adoption of a constitution was fixed for Thursday evening, August 5, Hotel Adelphia, at 8 o'clock. There being no further business the meeting adjourned.

Minutes of meeting held on August 5, 1920.

The second session (first regular meeting) of the Wholesale Tobacco & Cigar Dealers' Association assembled in parlors A, B, C, Hotel Adelphia on the above date, H. Stewart Moorhead, chairman, and N. W. Mead, secretary.

The constitution as prepared by the committee was adopted; the next business was the election of officers and directors, which resulted as follows: president, Nelson Eberbach; vice presidents, Harvey D. Narrigan, James Murphy; treasurer, Herman J. Krull; secretary, Paul L. Brogan; and a board of ten directors—Arthur Shipton, Frank Kuhn, William Cohen, S. T. Banham, Bennett Hollard, Frank Blatt, H. Stewart Moorhead, Philip Gordesky, William Shepherd, and M. Hochman.

The dues were fixed at \$25.00 payable in advance on July first of each year.

The regular meetings to be held on first Monday of each month.

The muster roll as signed at first meeting was read and accepted.

A luncheon was served and the meeting adjourned.

Meeting of officers and directors, Sept. 2d.

The officers and directors of the Wholesale Tobacco & Cigar Dealers' Association met in the office of Dusel, Goodloe & Co., 112 N. 7th street, on Thursday evening, Sept. 2d, and the following committees were chosen:

Executive Committee, H. Stewart Moorhead (chairman), L. Hartman, Meyer Blumenthal.

Philip Gordesky, William Cohen.

Finance Committee: M. Hochman (chairman), L. Fink, James Hechtold.

Membership Committee: Arthur Shipton (chairman), Frank Kuhn, John Murphy (Phila.).

The president directed that a special meeting of the association be called to meet at the Gladstone Apartments, 11th & Pine streets, on Thursday, Sept. 16th, at 8 o'clock.

Minutes of meeting held September 16th, 1920, at Gladstone

Apartments

The special meeting of the Wholesale Tobacco & Cigar Dealers Association was held as above stated, Nelson Eberbach, president, occupying the chair.

1215 Reading of minutes of previous meeting dispensed with.

Report of executive committee was read and adopted. Report of committee:

"Your committee reports that at a meeting of board of directors held September 24, it was unanimously resolved that the cash discounts on tobacco and cigarettes be not more than 8%."

The committee was requested to notify all members not in attendance at this meeting. There being no further business the meeting adjourned.

Minutes of meeting held October 4, 1920, at Gladstone Apartments

The regular monthly meeting of the Wholesale Tobacco & Cigar Dealers' Association was held on the above date and place. The meeting was called to order by the president, Nelson Eberbach, presiding. Minutes of previous meeting was read by the secretary, Paul L. Brogan, and accepted.

The first business before the assemblage was the question of credit.

Much discussion ensued as to best method of handling; several suggestions were made by Mr. Mitchell, Mr. Moorhead, Mr. Baum, and Mr. Bechtold. Mr. Moorhead moved that a committee of three be appointed to arrange for a credit system; the motion was seconded and adopted by unanimous vote; the following members were appointed a credit committee:

Paul L. Brogan, chairman; Herman J. Krull; and James Murphy (Camden). After further discussion on the credit subject by Mr. Banham, Mr. Blumenthal, and Mr. Cohen, there being no further business, the meeting adjourned.

Minutes of meeting held November 1st, 1920, Gladstone Apartments

The regular monthly meeting of the Wholesale Tobacco & Cigar Dealers' Assn. was held on the above date and place. President Eberbach called the meeting to order at 9 o'clock. Reading of minutes of previous meeting dispensed with; first business, report of credit committee, which was read and discussed by various members, with the result that the secretary was instructed to prepare a credit blank for distribution among the members. The treasurer's report was read and accepted and ordered spread on the minutes.

Report of treasurer

1217

Cash received (dues of association).....	650.00
Expenditures:	
Aug. 25th 1920 one (1) minute book.....	1.05
" " 500 postal cards.....	5.00
" " Carfare and other expenses of Mr. Mead.....	.98
Sept. 1st. Two cash books, one for Secy & one for Treas.....	1.50
Sept. 10th Postage stamps.....	1.00
" " Rubber stamps.....	.70
" " Printing & stationery.....	50.50
" " Rubber stamps.....	1.40
" " For services as secy., 8/5.....	5.00
" " Yeo & Lukens Inv., 9-7-20.....	2.35
" " Tip to waiter by Mr. Moorhead.....	1.00
" " Hotel Adolphus, 8/5-20.....	30.00
" 24th Use of room 9/16/20.....	5.00
Oct. 4th Secy. fees, October 4th.....	5.00
" 6th For use of room.....	5.00
	115.46
Balance.....	\$534.54

1218 President Eberbach stated that a committee of subjobbers called upon him in regard to discounts. General discussion on prevailing discounts, which turned into an experience meeting—every member present giving his own view of the controversy. It was moved and seconded that the price question be referred to the executive committee with instructions to report at next meeting. Passed. Mr. Moorhead moved and was seconded by Mr. Brogan, that a dinner be served at next regular meeting; adopted; moved, seconded and passed, that the expense of dinner be borne by the association, except for extra guests. The following entertainment committee was appointed by President Eberbach: Bennett Holland (chairman), W. R. Taylor, and T. H. Hart.

There being no further business—adjourned.

HOTEL WALTON, December 6, 1920.

Minutes of the regular monthly meeting of the Wholesale Tobacco & Cigar Dealers' Association held this date.

Prior to the business meeting a banquet was held, which was attended by 51 members and guests. Following the dinner, the business meeting was called to order by President Nelson Eberbach. The first business was calling of the roll, followed by reading of the minutes of previous meeting, which was approved.

1219 The executive committee made the following report:

"Your committee recommends that when gratis or other deals on cigarettes or tobacco are placed by the various companies, having a time limit, that immediately after the expiration of such time limit members will suspend the operation of the deal. Your committee also recommends that district agents of the various companies be permitted to pick up from the members their own product at list less 5%. The committee also made recommendation relative to prices on cigarettes and tobacco. The committee reports were adopted."

A word of thanks was given to the entertainment committee for the able manner in which the banquet was held and conducted.

There being no further business the meeting adjourned.

The regular monthly meeting of the Wholesale Tobacco & Cigar Dealers' Association of Philadelphia was held at the Gladstone Apartments, 11th & Pine Streets, Monday evening, January 3, 1921

The meeting was called to order by the president, Nelson Eberbach, at 9 o'clock. First business, calling the roll; second, reading of minutes of previous meeting, which was approved. Report of executive committee; report of treasurer was then read and approved and ordered spread on the minutes.

1920

Report of treasurer

Total receipts.....	\$717.50
" expenditures.....	142.48
1/3/21, balance.....	\$575.02

Following the treasurer's report, a general discussion was held on business conditions and prospects. Several good suggestions were made by various members for betterment of the trade among the jobbers, but no action was taken at this time. Adjourned.

Minutes of the regular monthly meeting of the Wholesale Tobacco & Cigar Dealers' Assn. held at Gladstone Apartments on Monday evening, February 7th, 1921, at 9 o'clock

The meeting was called to order by President Eberbach. Following calling of the roll, minutes of the previous meeting were read and approved.

The president then introduced Mr. Asbury Davis, of Baltimore, who made a very interesting and constructive address. Following Mr. Davis' talk, on motion duly made and seconded, a vote of thanks was tendered to Mr. Davis.

On motion duly made and seconded, it was ordered that the match deal be discontinued as of February 12.

No other business coming before the meeting, it was, on motion duly made and seconded, resolved the meeting adjourn.

1921 The regular monthly meeting of the Wholesale Tobacco & Cigar Dealers' Association of Philadelphia was held at the Gladstone Apartments Monday evening, March 7th

The meeting was called to order at 8.30, by the Pres., Nelson Eberbach, in the chair.

Roll call.

The standing committees made no reports. New business in re license bill No. 417. All members were requested to write to their

representative at Harrisburg protesting against the passage of this bill.

Discussion on price reduction by cigar manufacturers. Discussion on price cutting by sub-jobbers and others. Adjourned.

Meeting of the Wholesale Tobacco & Cigar Dealers' Association of Philadelphia at the Gladstone Apartments, 11th & Pine Streets, on Monday evening, April 4th, 1921

Meeting came to order at 8.30 with President Eberbach in the chair. Roll call; minutes of previous meeting read and accepted; report of committees; treasurer's report.

1222

Treasurer's report in detail

Cash balance, 2/7/21.....	\$445. 52
Expenditures since 2/7/21.....	10. 00
Cash balance, 3/7/21.....	435. 52
Exp. since 3/7/21.....	133. 00
Cash balance, 4/4/21.....	\$302. 52

Letter of Keystone Tobacco Merchants' Association of Wilkes Barre, Pa., read; letter from Pres. announced verbal resig. Murphy Bros., Philadelphia sub-jobbers read and referred to executive committee for consideration. It was moved and passed, that a committee of two be appointed to call upon the R. J. Reynold's Co., at expense of the association. After a discussion of business problems the meeting adjourned.

On motion duly made and seconded the annual dues of the association were raised to \$50.00 per annum.

No other business coming before the meeting it was duly moved and seconded the meeting adjourn.

Minutes of the regular monthly meeting of the Wholesale Tobacco & Cigar Dealers' Assn. held in Gladstone Apartments Monday evening, May 2d, 1921, at 8 o'clock

The meeting was called to order with President Eberbach in the chair. Following the calling of the roll, minutes of the previous meeting were read and approved.

Report of treasurer. Balance on hand April 4th, \$302.52; disbursements, \$148.00; balance, 5/2/21, \$154.52. On motion duly made and seconded the executive committee was authorized to employ a special investigator at a salary not to exceed \$50.00 per week.

On motion duly made and seconded it was ordered that the recruit deal be discontinued as of May 7th.

The chairman now explained that it was in order to nominate officers and directors at this time for the ensuing year, and on motion duly made and seconded it was agreed to nominate by voice and not by ballot, as called for by the by-laws.

On motion duly made and seconded present officers, with exception of 2nd vice pres., were renominated, Mr. Taylor being nominated for the 2nd vice presidency.

On motion duly made and seconded chairman was authorized to appoint a committee of 3 to arrange for a banquet at our next regular meeting June 6th, at which would be celebrated as first anniversary of the association. Chairman thereupon nominated the same committee as last year, namely, Mr. Taylor (chairman), Mr. Bennett Hollard, and Mr. Nicely, substituting for Mr. Hart.

1224 Minutes of the first annual meeting of the Wholesale Tobacco & Cigar Dealers' Assn., Philadelphia; was held at the Hotel Walton Monday evening, June 6, 1921.

The regular meeting was preceded by a banquet, and at 9 o'clock the president called the regular meeting to order.

Following the calling of the roll, minutes of the previous meeting were read and approved. The president then announced the necessity of renomination of officers, which was held, and the election which followed resulted in the election of all of the presiding officers with exception of the election of Mr. Wm. Fink as 2nd vice pres.

On motion duly made and seconded constitution was amended so that jobbers outside of Philadelphia district could be admitted as members of this organization.

On motion duly made and seconded the regular meetings for July and August were dispensed with.

No other business coming before the meeting, it was on motion duly made and seconded, resolved that the meeting adjourn subject to the call of the chairman.

1225 Minutes of the regular monthly meeting of the Wholesale Tobacco & Cigar Dealers' Assn. of Phila.; was held in Astor Theatre Bldg., Franklin & Girard Ave., Monday evening, September 12th.

The meeting was called to order by the president.

Minutes of the previous meeting were read and approved. Executive committee reported progress.

Treasurer's report

Balance on hand 9/6/21.....	\$414.32
Receipts.....	975.00
Total.....	1,389.32
Disbursements.....	845.80
Balance 9/12/21.....	543.52

Mr. Hartman of the membership committee, reported the application of Messrs. C. Shapiro, H. Balin, Fahey Tobacco Co., of Chester, Pa., and I. Goldberg, of Coatesville, Pa.

On motion duly made and seconded, these jobbers were accepted as members.

No other business coming before the meeting, it was on motion, duly made and seconded, resolved the meeting adjourn.

1226 Minutes of the regular monthly meeting of the Wholesale Tobacco & Cigar Dealers' Assn. of Phila.; was held in Astor Theatre Bldg., Franklin Ave., Monday evening, October 10th

The meeting was opened with President Everbagh in the chair. Minutes of the previous meeting were read and approved.

Executive committee reported progress, and the treasurer a balance of \$633.66 on hand.

Resignation of Baum & Neely was read and accepted with regret.

No further business coming before the meeting it was on motion duly made and seconded, resolved the meeting adjourn.

Minutes of the regular monthly meeting of the Wholesale Tobacco & Cigar Dealers' Assn. of Phila.; was held in Astor Theatre Bldg., Franklin & Girard Ave., Monday evening, November 7th

The meeting was opened with President Everbagh in the chair.

Minutes of the previous meeting were read and approved.

Executive committee reported have no work in hand.

No further business coming before the meeting, it was on motion duly made and seconded, resolved the meeting adjourn.

1227 Minutes of the regular monthly meeting of the Wholesale Tobacco & Cigar Dealers' Assn. of Phila.; was held in Astor Theatre Bldg., Franklin & Girard Ave., Monday, December 9th

The meeting was opened with President Everbagh in the chair.

Minutes of the previous meeting were read and approved.

Treasurer reported balance of \$333.66.

No further business coming before the meeting, it was, on motion duly made and seconded, resolved the meeting adjourn.

Minutes of the regular monthly meeting of the Wholesale Tobacco & Cigar Dealers' Assn. of Phila.; was held in Astor Theatre Bldg., Franklin & Girard Ave., Monday, January 6th

The meeting was opened with President Everbagh in the chair.

Minutes of the previous meeting were read and approved.

Treasurer reported balance of \$176.66.

No further business coming before the meeting, it was, on motion duly made and seconded, resolved the meeting adjourn.

CONSTITUTION AND BY-LAWS OF THE WHOLESALE TOBACCO & CIGAR
DEALERS' ASSOCIATION OF THE DISTRICT OF PHILADELPHIA

Constitution and by-laws of the Wholesale Tobacco & Cigar Dealers' Association of the District of Philadelphia.

CONSTITUTION

Name

The name of this organization shall be "The Wholesale Tobacco and Cigar Dealers' Association of the District of Philadelphia."

Object

To foster and maintain closer and more fraternal relations among its members; to promote uniformity in the customs and usages of the wholesale tobacco and cigar trade; to protect it from unlawful exactions; to facilitate the speedy adjustment of business disputes; to secure and make available to the trade information as to the standing of members; to secure or aid in securing such legislation as may be beneficial and the repeal of such laws as may be unjust to the trade; to correct any abuses as may exist in the conduct of the trade by its various members.

Membership

All individuals, firms, or corporations engaged in the wholesale tobacco and cigar trade in the district of Philadelphia (including Camden, N. J.) shall be eligible to membership in this association, but each individual, firm or corporation shall have but one vote in meetings.

All applications for membership must be made in writing to the membership committee, who shall investigate and report to the association, which by a majority may elect.

Any member more than six months in arrears for dues shall be dropped from the rolls of this association.

Dues

The dues of this association shall be \$25.00 per annum payable to the treasurer annually July 1st in advance.

BY-LAWS

Officers

The officers of this association shall be a president, two vice presidents, secretary, treasurer, and ten directors, who, together, shall constitute a board of directors, all of whom shall be elected at the annual meeting and shall serve for one year.

Vacancies occurring during the periods of annual meetings shall be filled by majority vote of the board of directors.

No individual, firm, or corporation shall have more than one representative among the directors.

Officers shall serve without compensation, except the secretary, but if any delegates or committees are appointed for work outside of the city this association shall stand the expense of such service.

Powers and duties of officers

The president shall preside at all meetings and shall be ex officio a member of all committees, and have power to appoint a committee to audit the treasurer's account.

The first vice president shall, in absence of president, preside at all meetings and perform such duties as would devolve on president were he present, and in the absence of both president and first vice president such duties shall devolve upon second vice president.

The secretary shall keep a correct copy of the minutes of each meeting and provide a safe place for all records. He shall issue all notices of meetings and of dues; attend to any correspondence of the association; and shall receive as compensation \$5.00 for each regular meeting.

The treasurer shall receive all moneys and pay such bills as may be approved by one or more members of the finance committee; keep a full account of all receipts and disbursements for the year and present same to the board of directors immediately before the annual meeting.

The board of directors shall consist of the president, two vice presidents, secretary, treasurer, and ten directors, who shall have the power to appoint committees to carry into effect any of the objects of the association. They (the board of directors) shall present at every annual meeting a written report of the action of the board and of such committees as have been appointed, which report shall show fully the work done by the organization during the previous year.

Directors shall be elected to serve for one (1) year.

Committees

The board of directors shall appoint committees as follows:

Executive committee.

Membership committee.

Finance committee.

The executive committee shall consist of five (5) members and shall be vested with powers to determine questions of moment, without reference to the general board, except such vital questions which, in their opinion, should be referred to the board.

Membership committee shall consist of three (3) members, who shall investigate all applications and report to the association.

Finance committee shall consist of three (3) members and shall have general supervision of all funds of the association.

No firms or corporations (members) shall have more than one representative on either of the three committees.

1233

Nominations

Nominations for officers and directors shall be made thirty (30) days prior to annual election, and by ballot.

Elections

Elections shall be by ballot unless otherwise ordered by majority of members present in any annual meeting; a majority by ballot shall be deemed sufficient to elect.

Meetings

Regular monthly meeting shall be held on the first Monday of each month. The annual meeting of the association shall be held on first Monday in June for the purpose of electing officers and transacting other business brought before the meeting.

Special meetings may be called by the president or at the request of the majority of the board of directors.

Notices of all meetings, indicating place, shall be mailed five (5) days prior to date of such meeting.

Ten (10) members shall constitute a quorum at all meetings.

1234

Order of business

1. Reading of minutes.
2. Report of committees.
3. Report of treasurer.
4. Unfinished business.
5. New business.

Amendments

Amendments to these by-laws may be made by two-thirds of the members present at any meeting.

COMMISSION'S EXHIBIT NO. 3

MEMBERSHIP ROLL

Wholesale Tobacco & Cigar Dealers' Association of Philadelphia

S. T. Banham & Bros., 4367 Main Street (Manayunk).

[Baum & Neely, Inc., 1323 Arch Street]*

J. S. Bechtold, 250 South Street.

Frank Blatt, 41st & Lancaster Avenue.

* Matter in brackets stricken out in original.

- 1235 M. Blumenthal, 108 South Street.
 Brucker & Boghien, Inc., 2213 N. Front Street.
 E. Cohen & Son, 512 So. Second Street.
 A. B. Cunningham & Co., 37 N. Second Street.
 M. J. Dalton Co., 501 Chestnut Street.
 Duncan & Moorhead, 722 Chestnut Street.
 Dusel, Goodloe & Co., 112-14 N. Seventh Street.
 Victor Fermari, 5142 Market Street.
 Franklin Tobacco Co., 518 So. Front Street.
 T. H. Hart & Co., 1514 Sansom Street.
 F. Hartman & Son, 3d & Arch Streets, Camden, N. J.
 P. Hochman, 3051 Frankford Avenue.
 Bennett Hollard, 2034 South Street.
 Chas. A. Krull, 55 N. Second Street.
 F. Kuhn & Bros., 437 W. Girard Avenue.
 [Murphy Bros., 2d & Market Streets, Camden, N. J.]*
 Peter F. Murphy Co., 131 N. Sixth Street.
 H. D. Narrigan & Co., 118 N. Sixth Street.
 S. Shepherd's Sons, 1628 Market Street.
 Shipton & Payne Co., 2854 N. Fifth Street.
 John Wagner & Sons, 233 Dock Street.
 F. G. H. Woerner & Sons, 4163 Main Street (Manayunk).
 Yahn & McDonnell, 1311-13 Sansom Street.
 I. Goldberg & Co., Coatesville, Pa.
 Richard Baylin, 800 W. 3rd St., Chester.
 M. B. Fahey Tob. Co., 718 Edgmont Ave., Chester.
 C. Shapero, 134 W. 3rd St., Chester.

1236

COMMISSION'S EXHIBIT NO. 4

(Stamp)

John Wagner & Sons Jun 11 1921 Philadelphia, Pa.

The Wholesale Tobacco and Cigar Dealers' Association of Philadelphia, office of the secretary, 112-14 N. 7th Street, Philadelphia

Philadelphia County and City of Camden, Effective June 20th, 1921, the Maximum Trade Discount will be 7%

Paper cigarettes when purchased in lots of 10 thousand, one brand or assorted, an extra allowance of 7½¢ per thousand.

Beech Nut cigarettes \$5.70 per thousand net.

* Matter in brackets stricken out in original.

1237

COMMISSION'S EXHIBIT No. 5

(Envelope)

(Stamp)
(Seal)

The Wholesale Tobacco and Cigar
Dealers' Association of Philadelphia
Office of the secretary,
112-14 N. 7th Street,
Philadelphia.

Mess. John Wagner & Sons
233 Dock Street
City

COMMISSION'S EXHIBIT No. 6

Eberbach exhibit

1-2351
LTC/AMB

Feb. 15th, 1921.

S. T. BASHAM & BROS.,
4367 Main St., Manayunk, Phila.

GENTLEMEN: We have further advices from Delaware and Maryland that your representative is cutting prices. It is reported to-day that you sold to W. E. Palmer, Harrington, Del., 5,000 cigarettes at \$7.75. All of the Baltimore jobbers are getting full list prices in that section by agreement with Philadelphia, and they have requested me to endeavor to get you to cooperate; otherwise I will force to throw this market open, and I am sure you would not care to be the cause of such action. You will please let me hear from you, and oblige,

Yours truly,

A. B. CUNNINGHAM & Co.

COMMISSION'S EXHIBIT No. 7

Eberbach exhibit

1-2351
LTC/AMB
March 25th, 1921.

Mr. P. F. O'Boyle,
Heed Bldg., Phila.

DEAR SIR: Please be advised that the best price we make to missionary men on your line and all other lines is a discount of 5%. This is the lowest price that our association permits any jobber to

make to factory representatives, and if you hear of any competing factory representative purchasing goods for less than this price, will you please advise the writer.

Yours truly,

A. B. CUNNINGHAM & Co.

In pencil: (Note: See minutes of meeting of wholesale T. & C. D. Assn., Dec. 6, 1920. L. T. C.)

1239

COMMISSION'S EXHIBIT No. 8

Eberbach exhibit

F. A. Davis, E. Asbury Davis, J. Milton Davis, Francis A. Davis,
F. A. Davis & Sons, manufacturers of cigars, wholesale dealers in
tobacco, cigarettes and snuff, 119-121 S. Howard Street.

BALTIMORE, MD., June 17, 1921.

A. B. CUNNINGHAM & Co.,

Phila., Pa.

GENTLEMEN: We are still getting complaints of S. T. Banham & Son quoting goods at cut price in Maryland and Delaware. If there is anything you can possibly do to get these people in line, we would appreciate it very much indeed.

Yours truly,

F. A. DAVIS & SONS,

Per E. A. D.

1240

COMMISSION'S EXHIBIT No. 9.

Eberbach exhibit

1-2351

LTC/AMB

June 20th, 1921.

F. A. DAVIS & SON,

Baltimore, Md.

GENTLEMEN: Replying to your of recent date, would say that we have not sent our representative any new samples of job lot plug of American Tobacco Co. The orders in question were for some lots that the parties had before, which we wish to dispose of.

Relative to S. T. Banham & Bro., we wrote them last week relative to the matter referred to and stated that if they do not discontinue cutting prices in Delaware it would be necessary to take the matter up with New York. We have been unable to get any satisfaction from Mr. Banham and think pressure from the above source would be the only method of handling them.

Yours truly,

A. B. CUNNINGHAM & Co.

Circular No. 2783

THE AMERICAN TOBACCO COMPANY, INCORPORATED,
111 Fifth Avenue, New York, June 29, 1921.

TO OUR JOBBING CUSTOMERS:

It is of the highest interest to this company to maintain permanent means of distributing its brands of tobaccos and cigarettes by efficient and businesslike methods.

We can only expect to obtain and hold customers when it is possible for jobbers to sell our products profitably.

It is obvious that a jobber of our products who sells at price which would not permit of the tobacco business itself being profitable, or the business on our brands being profitable taken by itself is a jobber who in the long run will be a detriment and not a benefit to our business as our customer.

Any jobber who sells our products without profit or with such a small profit that it will not benefit him to continue permanently in

the tobacco jobbing business on such a margin of profit is not
1242 a distributor who can afford us a safe and permanent avenue of distribution, and, if by his persistent price cutting he discourages and destroys the interest in our brands with competing jobbers we may eventually be left without adequate means of thorough distribution in his locality.

For this reason we are convinced that for the future of our business we are bound to prevent as far as we reasonably and lawfully may such demoralization in the trade so far as our products are concerned. This does not mean price maintenance, but it does mean that where a jobber is not interested in making a fair and reasonable profit on our brands and elects to sell our products, for motives of his own, at less than a living profit, we are forced to the conclusion that he is not sufficiently interested in our goods to make a desirable permanent customer and we shall feel at liberty to remove him from our list of direct customers.

We trust that this policy will have the approval of all customers who are concerned in making a livelihood out of the tobacco business.

Very respectfully,

THE AMERICAN TOBACCO COMPANY, INC.,
GEORGE W. HILL, Vice President.

GEORGE W. HILL.

1948

COMMISSION'S EXHIBIT No. 11

Circular No. 1369

(Letterhead of P. Lorillard Company)

August 3, 1921.

TO OUR CUSTOMERS:

Having received many inquiries from jobbers generally as to what the attitude of this company is in reference to the jobber receiving a legitimate profit for handling and distributing merchandise of this company's manufacture, we beg to quote herewith letter sent out on May 25, 1921, to many sections, which outlines our position, we think, quite clearly:

May 25, 1921.

TO OUR CUSTOMERS:

The 10% discount from our list price allowed all jobbers on our tobacco line is what we consider a fair and legitimate profit, accruing to the jobber for handling and distributing our goods.

Long business usage has confirmed the fairness of this arrangement.

Knowing that a reasonable profit is essential to the success of any business and that only successful jobbers are satisfactory and dependable distributors, we feel that it is good business for us to urge the jobber to sell our brands at prices that will not prove an injury to our valuable trade-marks. Where the jobber persists in disregarding our policy in such matters, it is logical for us to conclude that he is willing to sacrifice our business welfare for his own selfish interest.

We believe you will agree with us that it would be a very short-sighted policy to continue to supply such firms with the means of demoralizing our accustomed channels of distribution.

All orders subject to acceptance by our New York Office, and if accepted will be filled at prices ruling on day of shipment.

No representative or employee of this company has authority to change any circular, letter, or price list issued by this company.

Your respectfully,

P. LORILLARD COMPANY, INCORPORATED.

Since the issuance of this circular other manufacturers, we are pleased to see, have taken quite a similar action with a view to pointing out to the jobber the importance of bringing about a betterment of selling conditions existing in different sections of the country.

We now wish to advise that any move to better selling conditions in your section will, in so far as we can properly and lawfully assist, have our hearty support and approval.

Yours respectfully,

P. LORILLARD COMPANY, INCORPORATED.

Notice

The 35¢ per M allowance on Turkish cigarettes discontinued at close of business June 25th.

COMMISSION'S EXHIBIT No. 13

Schoenfeld & McAninley, jobbers in cigars, cigarettes, and tobacco.
A full line of matches, playing cards, and chewing gum

5833 MARKET STREET, PHILADELPHIA.

October 29, 1929.

Mr. PERCIVAL S. HILL,

111 Fifth Ave., N. Y.

DEAR SIR: In addressing you personally the sub-jobbers of Philadelphia appeal to you to use your influence to help correct a condition in this city that spells ruin for them if it continues.

As you are no doubt familiar with conditions here, we will not waste time in describing them; but we will say that, while

the sub-jobbers may be partly to blame, they are not more responsible than the jobbers for the demoralizing prices in this city, and do not deserve to be discriminated against, as they are at the present time, by the newly formed jobbers' organization.

During the present month any little grocery can buy merchandise at the same price in five and ten dollar orders as the sub-jobber who buys in thousands, and it seems to be the object of the direct jobbers to cater particularly to the trade that the sub-jobber calls upon.

Without dwelling at too great length upon the situation, it would seem that it is more or less an after-war development. Some of the larger jobbers found themselves very heavily stocked as a result of buying for war activities, and in order to move this excess encouraged the larger retailers to consider themselves as sub-jobbers, gave them an extra large discount, and induced them to sell wholesale in their localities. Some of these dealers, with the help of the large discount, turned to the cut-price game, and in the natural course of events the consuming trade drifted to these stores and the average neighborhood store that paid the jobber a profit, did that much less business. As time went on the jobbers found that the major portion of their sales were made to these stores at long discounts and their (the jobbers) profits materially reduced. As a first step toward recovery, the jobbers' organization changed the discount allowance from ten to eight per cent, making no distinction between the sub-jobbers who have been established for years and the quasi sub-jobbers who have sprung up lately.

Now the sub-jobbers do not object to the change in discount, but they feel that there should be a margin between the price to the sub-jobbers and the price to the dealers, and we feel that in appealing

to you you could see your way clear to urge upon the jobbers the justice of this fact.

In days gone by the American Tobacco Company recognized the sub-jobber as a legitimate and necessary outlet in the process of distribution and we feel they would not countenance an arrangement that would put them out of business.

Trusting you will consider our petition favorably and will be inclined to urge some measure of relief, we remain

Yours respectfully,

THE SUB-JOBBERS OF PHILADELPHIA,

Per

The following sub-jobbers join in this petition:

I. J. Abramson, 7th & Reed St.

David Margolis, 930 S. Ninth St.

M. Cohen, 834 N. Second St.

Prizant Bros., 1328 Columbia Ave.

S. Greenstein, 7228 Woodland Ave.

R. Shatz, 133 W. Girard Ave.

M. Beckman, 2906 Frankford Ave.

1248 Allen Bros., 23rd & Tasker St.

M. Davidson, 7th & Sp. Garden.

S. N. Levine, 6040 Haverford.

S. Zechter, 1105 South St.

A. Hurwitz, 23rd & Callowhill.

B. Hurwitz, 2906 Richmond St.

H. Steinberg, 2857 Kensington.

H. Carberry, 2825 Kensington.

J. Dash, 60th & Lombard St.

H. J. Nickel, 608 S. Second St.

Shrager Bros., 1717 South St.

D. Helfand, 318 S. Second St.

Phila. Tob. Co., 324 N. 13th St.

N. Levine, 9th & Locust St.

B. Honowitz, 1021 Locust St.

Schoenfeld & McAninley, 5833 Market St.

COMMISSION'S EXHIBIT No 14

Schoenfeld & McAninley, jobbers in cigars, cigarettes, and tobacco
5833 MARKET STREET, PHILADELPHIA, April 2, 1921.

The JOBBERS' ORGANIZATION OF PHILADELPHIA,

c/o Mr. Nelson Eberbach,

1249 GENTLEMEN: The dealers whose names are appended here-
with take this occasion to request the jobbers' organization
to consider the status of the sub-jobber.

Would ask that your organization act upon the following sugges-
tion: That these dealers will bind themselves to abide by whatever

rules and regulations are adopted, provided a friendly spirit of co-operation is instituted between the jobbers and sub-jobbers and provisions made to correct the demoralizing conditions that exist at present.

We feel that our interests lie along parallel lines and that it should not be so difficult for an arrangement to be made that will tend to promote confidence and harmony in our business relations with each other.

Trusting your organization will see their way clear to work out this problem at an early date we remain,

Respectfully yours,

R. Shatz, 133 W. Girard Ave.; M. Cohen, 934 N. 2nd St.; M. Davidson, 7th & Sp. Garden; Prizant Bros., 1328 Columbia; Allen Bros., 23rd & Tasker; I. J. Abramson, 7th & Reed; S. Greenstein, 7228 Woodland; D. Margolis, 930 S. Ninth St.; M. Beckman, 2906 Frankford Ave.; A. Hurwitz, 2906 Richmond St.; J. J. Cavanaugh, Manayunk; S. N. Levine, 6040 Haverford; J. Dash, 60th & Larchwood; Phila. Tob. Co., 324 N. 13th St.; S. Zechter, 1105 South St.; L. Ginsburg, 4030 Market St. (failed); D. Helfund, 318 S. Second St.; H. J. Nickel, 608 S. Second St.; Chas. Jones, Germantown Ave.; Schoenfeld & McAninley, 5833 Market St.

1251

(In pencil:) Include this list with letter to jobbers—

COMMISSION'S EXHIBIT NO. 15

Schoenfeld & McAninley, jobbers in cigars, cigarettes, and tobacco

5833 MARKET STREET, PHILADELPHIA, February 9, 1931.

MR. MAX NEUMAN,

Lorillard Tobacco Co.

DEAR MAX: Hearing that you were out of town for several days I thought you would be interested in the developments of the local situation and am dropping you these few lines to let you know.

The visit of Mr. Cohen and myself to Mr. Eberbach was not productive of any results other than a pleasant hour's conversation. Eberbach would make no positive statement nor would he make any promises or commit himself or the jobbers' organization in any way. About the only thing we could draw from him was his opinion that in about two months the situation in regard to the subjobbers would be adjusted. When we asked him what had been done in the four months that had passed he would only remark that such things could not be done hurriedly, that they must be carefully and slowly arranged or they would not last, but he could not tell us whether anything definite had been done. Altogether this visit was unsatisfactory as Eberbach is much like a clam and you have to actually draw from him every word he says.

Since that time the jobbers' organization has held its monthly meeting and the reports from that affair show that there is considerable dissension among their members. From the tales we have heard the subjobber question was much discussed and the arguments lasted so late that they had to adjourn without arriving at any settlement. That some members were sore is proved by the fact that several of them have offered to some of subjobbers the old rate of ten per cent.

Now we do not care to see the old conditions return, even though we were better off then than we are now, but we do hope that some constructive arrangement will be made that will put us all on a permanent and profitable basis for the future.

1252 Trusting you will continue your efforts and will be able to enlist the aid of those who are powerful enough to bring this about, we remain,

Yours, very truly,

The following exhibits are copied into the testimony:

No.	Page	No.	Page	No.	Page
16.	433	18.	415	20.	418
17.	433	19.	417	21.	419

COMMISSION'S EXHIBIT NO. 22

THE AMERICAN TOBACCO COMPANY, INCORPORATED,

111 Fifth Avenue, New York, March 19, 1921.

MESSE. MURPHY BROS.,

Camden, N. J.

GENTLEMEN: It has been called to my attention that there has been a number of report forms covering sales made by you 1253 under our recent offer, as outlined in circular 2748, either returned to you or being held at this office for the reason that the deal was sold by you to sub-jobbers.

I understand that, according to your association agreement, there are no recognized sub-jobbers in the city of Philadelphia, and I further understand that you treated all so-called sub-jobbers on exactly the same basis as you did the retail trade, considering them only in the sense of a retail merchant and sold according to your agreed price, at list less 8%.

If my understanding of this matter is correct and you will advise me that these so-called sub-jobbers were sold as retail merchants, on receipt of your advise I will be very glad to issue proper instructions to see that you are reimbursed for all such orders sold and delivered by you.

Very truly yours,

(Signed)

J. B. BEVILL,

Sales Manager.

J. B. Bevill,
MM.

1254

COMMISSION'S EXHIBIT No. 23

MARCH 30TH, 1921.

Mr. J. B. BEVILL,

*The American Tobacco Co.,
111 Fifth Ave., New York, N. Y.*

DEAR SIR: We are in receipt of your letter of the 19th inst., and contents of same has been carefully noted by the writer, and in reply I am pleased to advise you that we do not recognize any dealers in Philadelphia as sub-jobbers; they are all retailers and are recognized by us as such.

Trusting this is the information desired and thanking you, I am
Yours very truly,

COMMISSION'S EXHIBIT No. 24

Copied into the record. (See page 573.)

1255

COMMISSION'S EXHIBIT No. 25

THE AMERICAN TOBACCO COMPANY, INCORPORATED,

111 Fifth Avenue, New York, May 13, 1921.

Mr. CHARLES SEIDER,

Philadelphia, Pa.

DEAR SIR: Acknowledging your letter of May 11th with regard to delayed invoices covering regular shipments of standing orders:

We wish to state that these orders are being held pending the return of Mr. J. B. Bevill, who we expect in the office Monday, May 16th, at which time they will be brought to his attention.

Yours very truly,

(Signed) E. GREER,

Sales Department.

E. Greer.

W.L.H.

SC.

[In pencil]

5/20/21

In reply to letter dated 5/13, I beg to advise that up to date I have not received any information as to delayed shipments of regular and standing orders.

I would appreciate very much if you would advise me as to same. Yours truly,

My stock of your products is getting low and will in short time be depleted.

1256

COMMISSION'S EXHIBIT No. 26

THE AMERICAN TOBACCO COMPANY, INCORPORATED,
111 Fifth Avenue, New York, August 13th, 1921.

CHARLES SEIDER,
4th & Race Sts., Philadelphia, Pa.

DEAR SIR: There has been referred to this department your postal card of August 1st, and in which you request us to advise if orders of April 21st, 26th, and May 3rd will be shipped.

As you are aware, all shipments to your stock and for your account were withheld for some time, and when the account was released the orders referred to were cancelled, due to the fact that we hesitated to enter them on account of their age.

We were under the impression that you would much prefer to enter a new order for our brands, but if you desire these orders executed we would request that you advise us to that effect at once, and the matter will receive our immediate attention.

1257 Please address your response to the subscriber, thus assuring prompt attention.

Very truly yours,

(Signed) THE AMERICAN TOBACCO COMPANY,
H. J. HAGERTY, *Credit Dept.*

H. J. Hagerty,

IAP.

[In pencil:] Answered cancelling above orders.

COMMISSION'S EXHIBIT No. 27

P. LORILLARD COMPANY, INCORPORATED,
TOBACCO, CIGARETTES, CIGARS,
119 West 40th Street, New York, May 2, 1921.

Replying, refer to "SK."

Mr. CHARLES SEIDER,
S. E. Corner 4th and Race Sts.,
Philadelphia, Pa.

DEAR SIR: Replying to your letter of April 30th, we ask that you kindly place your orders for our products with jobbers convenient to you.

Thanking you in advance for any orders that you may submit through local jobbers, we are

Yours very truly,

(Signed) S. K. (?)
Assistant Auditor.

AA.

1258

COMMISSION'S EXHIBIT No. 28

(Letterhead of Charles Seider)

P. LOREILLARD,

N. Y.

PHILADELPHIA, MAY 4.

GENTLEMEN: In reply to your letter dated May 2 ("S. K.") [referring to "S. K.," beg to state that your letter puzzle me somewhat] * referring me to local jobbers to purchase your products. Do you intend shipping me orders at hand? If so, when can I expect to receive same? It would be impossible for me to purchase from local jobbers and expect me to compete with same. If delay in shipping orders be only temporally and receive [goods]* orders or part of same in near future, I would gladly accommodate my trade by making purchases through local jobbers.

This delay is quite embarrassing to me and a considerable loss [You can't expect me to sell your products for accommodation only.] * Hoping you will enlighten me as to when I may receive orders at hand, I remain

Yours truly,

CHARLES SEIDER.

1259

COMMISSION'S EXHIBIT No. 29

P. LOREILLARD COMPANY, INCORPORATED,

119 West 40th Street, New York, May 6, 1921.

Replying, refer to "SK."

Mr. CHARLES SEIDER,

S. E. Corner Fourth & Race Sts.,

Philadelphia, Pa.

DEAR SIR: Replying to your letter of May 4th will state that the information we intended to convey, when writing to you on May 2nd, was that we were not inclined to make further shipments direct and suggested that you supply your needs through jobbers convenient to you.

Yours very truly,

(Signed)

S. K.

(1)

Assistant Auditor.

MM.

[In pencil:] May 10—N. Y.

1260

COMMISSION'S EXHIBIT No. 30

P. LOREILLARD COMPANY,

119 West 40th Street, New York, October 14, 1921.

Replying, refer to "ET."

Mr. CHARLES SEIDER,

Philadelphia, Pa.

DEAR SIR: We are in receipt of your letter under date of October 10th and in reply will advise that the matter of reinstating you

* Matter in brackets stricken out in original.

to our direct list has been submitted to our sales board for its careful consideration.

We are also writing to all of our head salesmen covering Philadelphia to submit their recommendations and you will doubtlessly receive a visit from them in the near future.

Upon receiving reports from our head salesmen, we will be in a position to advise you definitely of our decision.

Yours truly,

(Signed)

P. LORELLARD COMPANY,
E. TRESELT.

AA.

1261

COMMISSION'S EXHIBIT No. 31

THE AMERICAN TOBACCO COMPANY,
111 Fifth Avenue, New York City, July 22, 1921.

File. O. W. P.

With regard to the recent circular issued by our Mr. George W. Hill relative to prices obtained for our merchandise by the jobbers.

Should any jobbers ask your advice in this matter you need not hesitate to tell them the following:

It is not our company's purpose to establish the prices at which our merchandise is sold. This is a matter which rests entirely in the hands of the jobbers in any given community.

We have no hesitation, however, in assuring the jobber that where a customary price prevails in a given community, we are entirely within our legal rights in removing from our direct list of customers, any jobber, who, by selling our merchandise at less than the prevailing price in that particular community thereby destroys the interest of our customers as distributors of our products.

In other words, if there are several jobbers in a certain town or community, and all these jobbers sell our merchandise at prices which are satisfactory to them, and if amongst these jobbers there is one who deliberately cuts the price beneath all the others, it is

this particular jobber who is disturbing the conditions in that community, and if you will report any such specific instance to the writer I will be glad to take up the matter direct.

You are to do no police duty in this matter of price adjustment, as it is up to the jobbers themselves to regulate their own prices to their own satisfaction, with the exception of the jobber who deliberately sells beneath the others in any given community.

Please advise me immediately if you thoroughly understand the matter in question.

Very truly yours,

GBF:LH.

P. S.—Under no circumstances are you to write a letter to any jobber relative to price-cutting or price conditions. You should talk this matter over personally with any jobber who makes a complaint or is interested in our circular.

MY DEAR MR. PEASLEE: I sent this letter to my D. M.'s. Will talk it over with each as I get to him. Please return this letter to me. Hope it is O. K.

(Signed) G. B. FREITAS,

1263

COMMISSION'S EXHIBIT No. 32

THE AMERICAN TOBACCO COMPANY,
111 Fifth Avenue, New York City, May 2, 1921.

Copy for O. W. Peaslee.
File. O. W. P.

MR. HARRY B. FINCH,
1722 Hennepin Ave., Minneapolis, Minn.

MY DEAR MR. FINCH: Acknowledging receipt of your letter of April 28th, addressed to Percival S. Hill.

Mr. Hill is at present in Europe and we do not expect him here for six or eight weeks from this time.

We have given consideration to your letter of April 6th and have not felt that it is at all possible to get co-operation as a unit from the leading tobacco manufacturers. As far as this company is concerned, as Mr. Hill wrote you, we are greatly interested in the matter and regret to see the tendency toward price cutting. We feel very definitely here that when jobbers have cooperated and have held such conferences as Mr. Hill has suggested, then the manufacturer can step in by refusing shipments or withholding orders from the demoralizers, and thereby assist those legitimate jobbers who desire to make a profit. Where, however, a condition of general demoralization exists, we feel here that there is little we can do. As a matter of information to you, your letter has been referred to our sales manager, Mr. O. W. Peaslee.

Regretting our inability to write more definitely at this time, we are

Very truly yours,

VICK PRESIDENT.

George W. Hill.
SFM.

COMMISSION'S EXHIBIT No. 33

NOVEMBER 5, 1921.

GENTLEMEN: We are in receipt of your letter of _____ and are glad to be advised that you consider circular No. 2783 of interest to you.

It is not our purpose here to establish the price at which our merchandise is sold; that is a matter which rests entirely in the hands of our customers in any given community.

We have no hesitation, however, in assuring you that where a customary price prevails in a given community, we are entirely within our legal rights in removing from our direct

1265

list of customers any customer who by selling our merchandise at less than the prevailing price in that community, thereby destroys the interest of our customers as distributors of our product.

Very truly yours,

VICE PRESIDENT.

George W. Hill.
AVA.

COMMISSION'S EXHIBIT No. 34

NOVEMBER 5, 1921.

GENTLEMEN: We are in receipt of your letter of and are glad to note that you are interested in circular No. 2783.

In connection with your inquiry, we beg to state that we here are not interested in nor do we co-operate with any association of jobbers or wholesale grocers whatsoever. We are simply interested in the proper distribution of our brands by the legitimate distributor, and to this end we state that it is not our purpose to establish the price at which our merchandise is sold; that is matter which rests entirely in the hands of our customers in any given community.

1266 We have no hesitation, however, in assuring you that where a customary price prevails in a given community, we are entirely within our legal rights in removing from our direct list of customers any customer who by selling our merchandise at less than the prevailing price in that community, thereby destroys the interest of our customers as distributors of our product.

Very truly yours,

VICE PRESIDENT.

George W. Hill.
AVA.

COMMISSION'S EXHIBIT No. 35

NOVEMBER 5, 1921.

GENTLEMEN: We are in receipt of your letter of and are glad to note that you are interested in circular No. 2783.

In response to your inquiry, we would state that we believe the list of direct accounts of this company is to-day "cleaner" than it has ever been in the history of the tobacco business. It is our policy here to only sell such legitimate jobbers who serve as distributors of our product in a given community and we are becoming more 1267 and more of the opinion that the distributor who does not carry in stock a representative line of the merchandise manufactured by this company, so that he may serve well the local retail trade, is not a distributor that is of value to this company.

It is not our purpose to establish the price at which our merchandise is sold; that is a matter which rests entirely in the hands of our customers in any given community.

We have no hesitation, however, in assuring you that where a customary price prevails in a given community, we are entirely

within our rights in removing from our direct list of customers any customer why by selling our merchandise at less than the prevailing price in that community, thereby destroys the interest of our customers as distributors of our product.

Very truly yours,

VICE PRESIDENT.

George W. Hill.
AVA.

COMMISSION'S EXHIBIT No. 36

NOVEMBER 5, 1921.

GENTLEMEN: We are in receipt of your letter of _____ and are glad to note that you are interested in circular No. 2783. 1268 In response to your inquiry, we would state that we believe the list of direct accounts of this company is to-day "cleaner" than it has ever been in the history of the tobacco business. It is our policy here to only sell such legitimate jobbers who serve as distributors of our product in a given community and we are becoming more and more of the opinion that the distributor who does not carry in stock a representative line of the merchandise manufactured by this company, so that he may serve well the local retail trade, is not a distributor that is of value to this company.

It is not our purpose to establish the price at which our merchandise is sold; that is a matter which rests entirely in the hands of our customers in any given community.

We have no hesitation, however, in assuring you that where a customary price prevails in a given community, we are entirely within our rights in removing from our direct list of customers any customer why by selling our merchandise at less than the prevailing price in that community, thereby destroys the interest of our customers as distributors of our product.

Very truly yours,

VICE PRESIDENT.

George W. Hill.
AVA.

1269

COMMISSION'S EXHIBIT No. 37

THE AMERICAN TOBACCO COMPANY,
111 Fifth Avenue, New York.

No. 4

GENTLEMEN: Acknowledging receipt of your letter of _____ we take it that you do not consider that all of our customers in your territory are selling our brands along lines that are to the best interest of our company.

We thank you for bringing this to our attention and assure you that the matter will be carefully investigated by one of our representatives at the very first opportunity that presents itself.

Very truly yours,

SALES MANAGER.

1270 COMMISSION'S EXHIBIT No. 38

THE AMERICAN TOBACCO COMPANY,
111 Fifth Avenue, New York.

4-B

DEAR SIR: Acknowledging receipt of your letter of _____, we take it you do not consider that all of our customers in your territory are selling our brands along lines which are to the best interests of our company.

You will appreciate that our facilities will not permit of making any investigation along general lines; but if you will furnish us with definite or specific information, the matter will be carefully investigated by one of our representatives at the very first opportunity that presents itself.

Very truly yours,

SALES DEPARTMENT.

E. A. Harvey.

1271 COMMISSION'S EXHIBIT No. 39

No. 5

[To be written to field sales managers on receipt of jobbers' complaint regarding demoralization of price conditions.]

DEAR SIR: We understand that _____ (jobber) is selling tobaccos and cigarettes at less than the customary price obtained in his community.

Will you kindly advise us as to whether in your opinion _____ (jobber) activities are interfering with and endangering the distribution of our brands and if so would you advise we discontinue _____ (jobber), from the direct list of the American Tobacco Company.

Very truly yours,

SALES MANAGER.

1272 COMMISSION'S EXHIBIT No. 40

111 Fifth Avenue, New York City, September 15, 1921.

Mr. GEORGE W. HILL,

c/o The American Tobacco Company of the Pacific Coast,
San Francisco, Cal.

DEAR SIR: We have had a number of general complaints regarding some customer or other as being a disturbing element, which give us no specific information in the matter at all.

Mr. Hill also received one or two such communications direct and discussed the matter with me. It was his feeling, with which I think you will agree, that where we do not receive some specific information that we should not call upon our men to investigate the matter, but ask for some specific information, and in this connection, at his request, I write another letter covering this situation, copy of which I attach, and have called same "4B."

On general complaint received we will write this letter 4B and of course will not write letter 5 to the field sales manager. On any complaint that gives us specific information, we will continue to write letters 4 and 5.

1273 I am forwarding copies of this correspondence to the American Tobacco Company of the Pacific Coast, so that they will be in touch with the situation if this letter does not reach you while you are on the coast.

Very truly yours,

SALES DEPARTMENT

E. A. Harvey.
RC.

COMMISSION'S EXHIBIT No. 41

THE AMERICAN TOBACCO COMPANY,
111 Fifth Avenue, New York City, June 3rd, 1921.

[Copy of this letter sent to all sales managers]

Mr. E. A. HARVEY,

Office.

MY DEAR MR. HARVEY: Attached hereto please find copies of circulars issued by Liggett & Myers and P. Lorillard with reference to cutting prices.

1274 Please think these over and bring them to the writer's office for discussion at your earliest convenience.

Very truly yours,

VICE PRESIDENT.

George W. Hill.
EKH

Noted. E.A.H.

COMMISSION'S EXHIBIT No. 42

Circular No. D-415

W. DUKE SONS & Co.,
BRANCH OF LIGGETT & MYERS TOBACCO COMPANY, INC.,
212 Fifth Avenue, New York, May 17th, 1921.

To our customers:

Our brands of cigarettes are billed to you at list price, less an allowance of 10% and 2% for cash in ten days.

Our prices and discounts are based on a reasonable and fair profit to jobbers and retail dealers, and there is no good reason for
1275 your selling our products at a price which will finally result in damage to our brands and permanent injury to our business.

We reserve the right to discontinue direct shipments of our brands to any customer who uses this allowance to demoralize prices on our brands, resulting in damage to our business and positive injury to our valuable brands on which we have spent large sums of money in creating a favorable good will.

All orders subject to acceptance by us and to prices ruling on date of shipment.

No employee of this company has authority to change this, or any other circular, or any price list or letter of this company.

Very truly yours,

W. DUKE SONS & CO. BRANCH.

COMMISSIONER'S EXHIBIT No. 43

CIRCULAR No. 1350

P. LORILLARD COMPANY,

119 WEST 40TH STREET,

New York City, N. Y., May 26th, 1921.

To Our Customers:

The 10% discount from our list price allowed all jobbers on our tobacco line is what we consider a fair and legitimate profit,
1276 accruing to the jobber for handling and distributing our goods.

Long business usage has confirmed the fairness of this arrangement.

Knowing that a reasonable profit is essential to the success of any business and that only successful jobbers are satisfactory and dependable distributors, we feel that it is good business for us to urge the jobber to sell our brands at prices that will not prove an injury to our valuable trademarks. Where the jobber persists in disregarding our policy in such matters, it is logical for us to conclude that he is willing to sacrifice our business welfare for his own selfish interests.

We believe you will agree with us that it would be a very short-sighted policy to continue to supply such firms with the means of demoralizing our accustomed channels of distribution.

We trust it will be your pleasure to cooperate with us in preventing that which is undesirable.

All orders subject to acceptance by our New York office, and if accepted will be filled at prices ruling on day of shipment.

No representative or employee of this company has authority to change any circular, letter, or price list issued by this company.

Yours respectfully,

P. LORILLARD COMPANY, INCORPORATED.

1277

COMMISSION'S EXHIBIT No. 44

THE AMERICAN TOBACCO COMPANY,
111 Fifth Avenue, New York City, July 8th, 1921.

Mr. F. FAULK,

Route List.

DEAR SIR: Replying to yours of the 2nd inst., I wish that in the future you would not arrange any meetings for your jobbers. You should suggest to the jobbers that it is their duty to get together themselves.

We do not want to be a part of any organization whatsoever, but we will insist upon the maintenance of the price that I suggested to you, as all jobbers with whom I come in contact advise me that this is the prevailing price in this community.

Very truly yours,

SALES MANAGER.

V. Riggio.

HMS

1278

COMMISSION'S EXHIBIT No. 45

THE AMERICAN TOBACCO COMPANY,
111 Fifth Avenue, New York City.

H. V. Ellis, P. O. box 944, Roanoke, Va.

OCTOBER 12TH, 1921.

Mr. C. A. Heyd,

Richmond, Va.

DEAR SIR: I heard Monday that there were some investigators of the Federal Trade Commission in Roanoke inquiring into attitude of the local jobbers and manufacturers as to the tobacco price situation.

I withheld a report on this until I could find out definitely if this was correct and have found same to be true. Mr. W. A. Mehegan and Mr. Miller of New York and another gentleman from Washington are conducting the investigation; understand they have been here since Saturday.

The investigation has been brought about by the request of W. J. Kelly, local tobacco jobber, who is not on our direct list.

The investigators have already visited several of the jobbers and no doubt intend calling on all of them.

1279 They are particularly interested in our company's attitude toward W. J. Kelly and Mr. Hill's letter of recent date.

Some of the jobbers are somewhat disturbed over the situation, while others are glad that it came about, as they believe it will develop a stabilization of prices.

Understand the investigators are going to interview me and if they do I will refer them to you, advising that I have no authority in the matter.

Will advise any developments.

Very truly yours,

H. V. ELLIS. (Signed)

Mr. Bevill—Please note. Heyd.

COMMISSION'S EXHIBIT No. 46

1280

THE AMERICAN TOBACCO COMPANY,

111 Fifth Avenue, New York City, October 21st, 1921

Mr. C. A. HEYD,

Route List.

DEAR SIR: I beg to acknowledge receipt of letter of your Mr. H. V. Ellis under date of October 12th.

As outlined in our recent wire, we would thank you to advise your men, as you come in contact with them along the same lines as we advised you; that is, to politely refuse to discuss the matter with any investigators and refer them to the New York office.

For your personal information, I beg to advise that the account of W. J. Kelly was discontinued September, 1920, entirely for credit reasons. We had many controversies and much correspondence regarding payments with this jobber until it reached that point where we found it necessary to discontinue the account.

Very truly yours,

SALES DEPARTMENT.

E. A. Harvey,
RC.

COMMISSION'S EXHIBIT No. 47

1281

Circular No. 2727

[Letterhead of the American Tobacco Company]

NOVEMBER 3, 1920.

(Revised as of Sept. 30, 1922)

PREPAID DROP SHIPMENT OFFER

To our Jobbing Customers:

Effective at once, and until further advised, we will make PREPAID DROP SHIPMENTS as outlined below to retail dealers in the territory designated on page 2.

FREE

THREE (3) 10¢ BAGS OF "BULL" DURHAM
WITH EACH TWELVE (12) CARTONS, OR MUL-
TIPLES THEREOF, TO BE SHIPPED BY PARCEL
POST OR EXPRESS PREPAID

1. Each order must contain at least five brands.
2. Each style of a brand will count as a brand.
3. Orders containing more than sixty (60) cartons will not be accepted.

NOTE.—See our price list for size of cartons.

NOTE.—See our price list for size of cartons.

1282 SERVICE ON HIGH GRADE BRANDS TWO (2) DOZEN ASSORTED

One or more units of two (2) dozen each of an assortment of the brands and sizes listed herein may be included in orders applying under this offer.

Each two (2) dozen assortment will count as one carton:

Blue Bear.....	25c, 30c, 60c
Capstan Navy Cut (Wills').....	30c, 60c
Carlton Club.....	Ten Lead
E. C. C'S Mixture.....	\$1.00
Garrick (Lambert & Butler's).....	30c, 60c
Imperial Cube Cut.....	30c
Latakia (Wills').....	45c, 85c
Lone Jack.....	10c, 30c
Louisiana Perique (Allen & Ginter's).....	25c, 35c
Three States.....	25c, 30c, 45c
Yale Mixture.....	15c, 25c

THIS OFFER IS SUBJECT TO THE FOLLOWING CONDITIONS

1. Drop Shipments under this offer will not be made in care of a jobber.
2. Orders applying under this offer cannot apply under the terms of any other offer that is now or may be hereafter be put into effect.

1283 3. This offer does not apply to our direct customers or to sub-jobbers or to the retail departments of either, and the privilege of taking orders under this offer will be withdrawn from any jobbing customer who diverts a drop shipment to his stock.

All orders are subject to acceptance by our New York office, and to prices and styles in effect at our factory on date of shipment.

No representative or employee of this company has authority to change any circular, letter or price list issued by this company.

Very respectfully,

THE AMERICAN TOBACCO COMPANY, INCORPORATED

This offer applies to retail dealers except those located in the following territory:

CONNECTICUT	NEW JERSEY
MAINE	NEW YORK
MASSACHUSETTS	RHODE ISLAND
NEW HAMPSHIRE	VERMONT

1284

COMMISSION'S EXHIBIT No. 48

CIRCULAR No. 1350

P. LORILLARD COMPANY,

119 West 40th Street, New York, May 25, 1921.

To Our Customers:

The 10% discount from our list price, allowed all jobbers on our tobacco line is what we consider a fair and legitimate profit, accruing to the jobber for handling and distributing our goods.

Long business usage has confirmed the fairness of this arrangement.

Knowing that a reasonable profit is essential to the success of any business and that only successful jobbers are satisfactory and dependable distributors, we feel that it is good business for us to urge the jobber to sell our brands at prices that will not prove an injury to our valuable trade-marks. Where the jobber persists in disregarding our policy in such matters, it is logical for us to conclude that he is willing to sacrifice our business welfare for his own selfish interest.

We believe you will agree with us that it would be a very short-sighted policy to continue to supply such firms with the means of demoralizing our accustomed channels of distribution.

1285 We trust it will be your pleasure to co-operate with us in preventing that which is undesirable.

All orders subject to acceptance by our New York office, and if accepted will be filled at prices ruling on day of shipment.

No representative or employee of this company has authority to change any circular, letter, or price list issued by this company.

Yours respectfully,

P. LORILLARD COMPANY, INCORPORATED.

COMMISSION'S EXHIBIT No. 49

Circular No. 1363

P. LORILLARD COMPANY,

119 West 40th Street, New York, July 21, 1921.

To Our Customers:

The 10% discount from our list price allowed all jobbers on our tobacco line is what we consider a fair and legitimate profit, accruing to the jobber for handling and distributing our goods.

1286 Long business usage has confirmed the fairness of this arrangement.

Knowing that a reasonable profit is essential to the success of any business and that only successful jobbers are satisfactory and dependable distributors, we feel that it is good business for us to urge the jobber to sell our brands at prices that will not prove an injury to our valuable trade-marks. Where the jobber persists in disregarding our policy in such matters, it is logical for us to conclude that he is willing to sacrifice our business welfare for his own selfish interest.

We believe you will agree with us that it would be a very short-sighted policy to continue to supply such firms with the means of demoralizing our accustomed channels of distribution.

All orders subject to acceptance by our New York Office, and if accepted will be filled at prices ruling on day of shipment.

No representative or employee of this company has authority to change any circular, letter or price list issued by this company.

Yours respectfully,

P. LEBILLARD COMPANY, INCORPORATED.

1287

COMMISSION'S EXHIBIT No. 50

LAW OFFICES, WHITE, WHITE & TAULANE,

1201 STEPHEN GERRARD BUILDING,

Philadelphia, December 12, 1922.

ELS—Docket #886

W. H. FULLER, Esq.,

Chief Counsel, Federal Trade Commission,

Washington, D. C.

Federal Trade Commission

VS.

Phila. Wholesale Tobacco Dealers Assn.

DEAR SIR: I have your letter of December 7th stating that the next meeting in the above will be at Washington on December 14th at 10.30 a. m., when the Philadelphia Wholesale Tobacco Dealers Association and the members thereof may offer evidence on their behalf if they so desire, and if they do not so desire, it should be so stated.

On behalf of the Philadelphia Wholesale Tobacco Dealers Association and those members thereof for whom I have entered appearance I beg to say that we will offer no testimony, and you may make this letter part of the record.

Yours very truly,

(Signed)

JOSEPH T. TAULANE

1288

COMMISSION'S EXHIBIT No. 51

DECEMBER 7, 1922.

MR. JOHN MURPHY,
c/o *Murphy Brothers*,
Camden, New Jersey.

Docket No. 886

DEAR SIR: In the event that you desire to introduce testimony in your behalf in the above designated proceeding, you will have an opportunity to do so before the trial examiner, George McCorkle, Esq., on December 14, 1922, 10.30 a. m., at the hearing room of the commission, 20th & D Sts. NW., Washington, D. C. If you do not desire to offer testimony in your own behalf, kindly address a letter to the commission, or to the trial examiner, so that it may be in the hands of the trial examiner not later than the 13th inst., stating that you waive the introduction of testimony in defense of the allegations in the complaint.

Very truly yours,

W. H. FULLER, *Chief Counsel*.

ELS/AL.

12-7-22.

1289

COMMISSION'S EXHIBIT No. 52

DECEMBER 7, 1922.

MR. JAMES MURPHY,
c/o *Murphy Brothers*,
Camden, New Jersey.

Docket No. 886

DEAR SIR: In the event that you desire to introduce testimony in your behalf in the above designed proceeding, you will have an opportunity to do so before the trial examiner, George McCorkle, Esq., on December 14, 1922, 10.30 a. m., at the hearing room of the commission, 20th & D Sts. NW., Washington, D. C. If you do not desire to offer testimony in your own behalf, kindly address a letter to the commission or to the trial examiner, so that it may be in the hands of the trial examiner not later than the 13th inst., stating that you waive the introduction of testimony in defense of the allegations in the complaint.

Very truly yours,

W. H. FULLER, *Chief Counsel*.

ELS/AL.

12-7-22.

1290

COMMISSION'S EXHIBIT No. 53

Murphy Brothers
Wholesale Tobacconists
Fine Imported and Domestic Cigars
Delaware Ave. and Market St.

CAMDEN, N. J., *December 11, 1922.*

FEDERAL TRADE COMMISSION,
Washington, D. C.

Docket 886

GENTLEMEN: Replying to your letter of the 7th inst., beg to state that Mr. James Murphy and Mr. John Murphy waive the introduction of testimony in defense of the allegations in the complaint.

Thanking you for your attention to this matter, we are
Very truly yours,

(Signed) MURPHY BROS.
JAMES MURPHY.

JM-A.

1291

COMMISSION'S EXHIBIT No. 1

(D. 886, Nov. 28, 1922)

(Copy)

AMERICAN TOBACCO COMPANY,
111 Fifth Ave., New York, N. Y., July 28, 1921.

MR. J. C. LINDNER,
*Reid Tobacco Company,
Milton, Pa.*

MY DEAR CLARENCE LINDNER: For your information I am pleased to advise you that after a thorough investigation made by our M. T. F. O'Boyle regarding the charges against the Wirth Cigar Company, Canton, Pa., we have discontinued the account from the direct list of the American Tobacco Company, effective as of July 22nd.

While I know that both you and I appreciate the action as taken in this matter, and that we both know it is 100% correct, again I know that you fully realize the danger the manufacturer runs in cutting off a source of his distribution. With this in mind, I am going to ask that you issue proper and necessary instructions to your selling organization to make a special effort to maintain a distribution of our brands in the section or district formerly covered by the Wirth Cigar Company.

1292 I feel if we can all work together with that spirit of co-operation the future of all legitimate jobbers is assured, and I want you to know that I am ever ready to be of assistance and take

action when called on to do so, always, of course, providing we have accurate evidence on which to work.

Thanking you for all past favors, and with kindest personal regards,

Very truly yours,

J. B. BEVILL, *Sales Manager.*

JB. B.
GES.

1993

COMMISSION'S EXHIBIT No. 2

(D. 886, Nov. 28, 1922)

[Copy]

AUGUST FOURTH, 1921.

Personal.

J. B. BEVILL,

Sales Manager,

The American Tobacco Company,

111 Fifth Ave., New York, N. Y.

DEAR MR. BEVILL: In reply to yours of July 28th, concerning "Cranston" and "Wirth":

Your apology, of course, is accepted, altho unnecessary; we feel the least "Scranton" or "Huber" could have done after the trouble, time and money we spent in affecting an adjustment with you for them would have been to drop us a line and say that everything was now right, but up to date they have said nothing.

Yesterday we talked over the "Wirth" matter with "Tommy" O'Boyle. Told him we knew Mr. Wirth well enough that if he would give him his word that he would cooperate; would be very glad to have them reinstated even though they have just been taken off.

Don't think it is the intention of the association to work a hardship on any competitor—at least it is not our feeling—

but at the same time if people need a real lesson before they realize how to "play fair" then we are in for giving it to them.

Rest assured too that any action taken by your people as regards taking off any jobber will cause us to do our utmost in that certain territory to protect your interests.

Enclose copy of "Lorillard's" latest circular, which shows a continuation of the American spirit; by all working together we will get somewhere in the near future, and the quicker we can bring the arbitrary jobber to realize that all the larger manufacturers are with us, so long as we are on the right track, just that much quicker will all associations be able to do real work.

"Wirth" has shown his willingness to cooperate by writing for membership in the Keystone Association for his Canton, Pa., store. (Elmira, N. Y., later on, we understand, will affiliate with York State.) In all probability he will be accepted.

Our next scheduled meeting will be Williamsport, Wednesday, p. m., August 10th.

If you happen to be in Williamsport that day, would be glad to spend evening with you.

With kind personal regards—remain

Truly yours,

-----, Secy.-Treas.

JLC:K.

1295

COMMISSION'S EXHIBIT NO. 3

(D. 886, Nov. 28, 1922)

(Copy)

AMERICAN TOBACCO COMPANY,
111 Fifth Ave., New York, N. Y., July 28, 1921.

Mr. J. C. LINDNER,
Reid Tobacco Company,
Milton, Pa.

MY DEAR CLARENCE LINDNER: Here is an apology, and I am just awfully sorry that both myself and my secretary overlooked the very important fact of advising you that the account of the Scranton Tobacco Company, Scranton, Pa., had been reinstated on the direct list of the American Tobacco Company, effective July 18th.

It surely was my intention to advise you on the same day that I advised the Scranton Tobacco Company, but it just slipped and that is all I can say.

Again with kindest regards,

Very truly yours,

J. B. BEVILL, Sales Manager.

1296

COMMISSION'S EXHIBIT NO. 4

(D. 886, Nov. 28, 1922)

(Copy)

NEW YORK, N. Y., August 26, 1921.

Mr. J. C. LINDNER,
Reid Tobacco Company,
Milton, Pa.

MY DEAR MR. LINDNER: Referring to your complaint regarding Eli Bull, of Nescopeck, Penna., our Mr. O'Boyle has had this matter investigated and advised that the jobber now thoroughly understands the custom maintained by other jobbers in the vicinity and has changed his policy to conform with same.

Very truly yours,

J. B. BEVILL, Sales Manager.

J. B. Bevill.
MH.

1297

COMMISSION'S EXHIBIT No. 5

(D. 886, Nov. 28, 1922)

[Copy]

AUGUST TWELFTH, 1921.

Mr. T. F. O'BOYLE,

321 Heed Bldg., Philadelphia, Pa.

FRIEND O'BOYLE: Sorry I missed you in Williamsport last week—you possibly overlooked the fact that you would write me the result of your visit to Wirth Cigar Company, Canton. Of course I took for granted it would be all right any way, and that they would be properly reinstated, which shows the right spirit on the part of all those interested.

Mr. Wirth phoned me that he had been reinstated and expressed his thanks to "Mother" Dooley and myself for our help in this.

Best wishes—remain,

-----, Secy. Treas.

JCL:K.

1298

COMMISSION'S EXHIBIT No. 6

(D. 886, Nov. 28, 1922)

[Copy]

PHILADELPHIA, Pa., August 16, 1921.

Mr. J. C. LINDNER,

Secy. Treas., The Reid Tobacco Company,

Milton, Pa.

MY DEAR MR. LINDNER: As a matter of record, I beg to advise that the Wirth Cigar Company of Canton, Pa., have been reinstated on our direct list.

Your, very truly,

T. F. O'BOYLE.

1299

RESPONDENT'S EXHIBIT No. 1

(Lorillard)

MAY 6, 1921.

Replying, refer to "SK."

Mr. JAMES MURPHY,

% Murphy Brothers,

Camden, New Jersey.

DEAR SIR: Complying with instructions from our president, Mr. T. J. Maloney, we have issued such orders on our factory as were being held by this department for credit reasons.

In connection with this matter we beg to enclose herewith statement of your account showing balance of \$18,139.11, which is be-

yond the 30-day period we are instructed to allow you. In this amount has been included short-paid discounts amounting to \$1,171.11, which were not allowed owing to your failure to discount the bills within the 30-day period.

We would suggest when next in the city you take this item up with either Mr. Belt or Mr. Ball.

Yours very truly,

ASSISTANT AUDITOR.

Enclosure.

[In pencil:] (Dict. by Mr. Ball.)

1300

RESPONDENT'S EXHIBIT No. 2

(Lorillard)

WALTER S. FLEMING, M. D.,

141 RICH AVENUE,

Mount Vernon, N. Y., Oct. 30th, 1922.

This is to certify that David H. Ball of 327 E. Sidney Ave., Mt. Vernon, N. Y., was attacked by ptomaine poisoning from fish eaten on a train on Sept. 14th, 1922, while on a trip to see his mother; that he was under my treatment from Oct. 18th through Oct. 24th, 1922; that I gave him directions as to treatment and diet, & suggested that he take a rest from business for two weeks, & put himself under medical treatment at a sanitarium for that time.

(Signed) WALTER S. FLEMING, M. D.

Sworn to and subscribed by

[SEAL.]

H. R. LOWE,

Notary Public, Westchester County.

OCT. 30, 1922.

1301

RESPONDENT'S EXHIBIT No. 3

(Lorillard)

Circular No. 1350

P. Lorillard Company, Tobacco, Cigarettes, Cigars. 119 West 40th Street

NEW YORK, May 25, 1921.

To Our Customers:

The 10% discount from our list price allowed all jobbers on our tobacco line is what we consider a fair and legitimate profit, accruing to the jobber for handling and distributing our goods.

Long business usage has confirmed the fairness of this arrangement.

Knowing that a reasonable profit is essential to the success of any business and that only successful jobbers are satisfactory and dependable distributors, we feel that it is good business for us to urge the jobber to sell our brands at prices that will not prove an injury to our valuable trade-marks. Where the jobber persists in disregarding our policy in such matters, it is logical for us to conclude that he is willing to sacrifice our business welfare for his own selfish interest.

We believe you will agree with us that it would be a very short-sighted policy to continue to supply such firms with the means of demoralizing our accustomed channels of distribution.

We trust it will be your pleasure to cooperate with us in preventing that which is undesirable.

All orders subject to acceptance by our New York office, and if accepted will be filled at prices ruling on day of shipment.

No representative or employee of this company has authority to change any circular, letter or price list issued by this company.

Yours, respectfully,

P. LOEILLARD COMPANY, INCORPORATED.

Mailed to West Virginia only.

RESPONDENT'S EXHIBIT No. 1

(American Tobacco Co.)

Harry B. Finch, Minneapolis, Minn., 1722 Hennepin Ave.

April 1, 1921.

MY DEAR MR. HILL:

For some considerable period Rust-Parker-Martin Company of Duluth, Minnesota, have allowed a discount of, as reported to me, 5% on drop shipments of tobacco to North Dakota territory. The Creasey Corporation of Grand Forks also allow 5% or more, generally 7%.

Claiming, so I understand, that their action is based on the policy of the two houses above named, the Stone-Ordean-Wells Company have, throughout, all of North Dakota, announced a 5% discount to apply on all orders for tobacco, large or small, for shipment from stock or from the factory. All jobbers in that State are, therefore, now forced to a 5% basis.

I am writing you to ask if in your judgment such a condition is not injurious to the interests of the manufacturers and if so, manufacturers may not be willing to use their good offices to bring about an adjustment that will re-establish regular discounts.

With personal regards, very truly yours,

(Signed)

H. B. FINCH.

HBF:NB

Mr. PERCIVAL S. HILL,

c/o American Tobacco Co., New York City.

American Tobacco Co.

1304

RESPONDENT'S EXHIBIT No. 2.

APRIL 4, 1921.

Mr. H. B. Finch,

1722 Hennepin Ave., Minneapolis, Minn.

MY DEAR MR. FINCH: I have your letter of the 1st. I regret to see a disposition on the part of a number of our good friends to cut prices on tobacco. I believe this is injurious to our cause, and we shall be glad to do what we can to bring about its discontinuance. I don't know, however, just how to go about it and would be glad to have a suggestion from you. It does seem to me that a conference among jobbers themselves would do more to correct an evil of this kind than any other method.

The Creasey Corporation of Grand Forks, N. D., we do not sell.

Yours very truly,

P. S. HILL.

J. G.

1305

RESPONDENT'S EXHIBIT No. 3.

(American Tobacco Co.)

Harry B. Finch, Minneapolis, Minn., 1722 Hennepin Ave.

APRIL 6, 1921.

Mr. PERCIVAL S. HILL,

111 5th Ave., New York City.

DEAR MR. HILL: Answering your letter of April 4th.

I agree with you that the jobbers should be able to solve problems like this for themselves. They seldom are, however, and in this case have failed.

Upon your invitation I offer as a solution the following suggestion:

That if possible, the leading manufacturers, namely, Liggett & Myers, R. J. Reynolds Tobacco Company, P. Lorillard & Company, and the American, reach an agreement respecting a policy to govern sales to customers who are discount givers, and I believe this policy should be that the manufacturers' discount to such jobbers would be reduced by the amount the jobber allows the retailer.

It is not my idea that such a policy should be applied arbitrarily without the customer being given a hearing.

1306 My reasoning is that if the jobber represents an economical and valuable means of distribution, then for his service he should receive reasonable compensation. The manufacturer should not willingly permit the minority to force the majority of his distributors on to an unprofitable basis.

My information is that the practice of giving special discounts on tobacco is spreading rapidly all over the Northwest. Montana

is as bad as North Dakota. To a somewhat lesser extent it is being done in South Dakota. Your help in this matter will be appreciated.

Yours very truly,

HBFB:NB

(Signed)

H. B. FINCH.

RESPONDENT'S EXHIBIT No. 4

(American Tobacco Co.)

Harry B. Finch, Minneapolis, Minn., 1722 Hennepin Ave.

APRIL 28, 1921.

MY DEAR MR. HILL: It was on April 6th that I last wrote you relative to the demoralization in the tobacco business existing in this part of the country. My letter was in answer to yours of April 4th.

Have you given the subject further consideration, and do you think it is possible that your company can assist in correcting this situation?

I write again now because I fear that everybody is going to be forced into the cut-price practice and this soon unless those who are now indulging in it can be induced to stop.

With kind regards, very truly yours,

(Signed)

H. B. FINCH.

HBFB:NB

MR. PERCIVAL HILL,

New York City.

(In pencil) Miss Keller has other correspondence. O. V. R.
5 4 21.

1308

RESPONDENT'S EXHIBIT No. 5

(AMERICAN TOBACCO CO.)

Circular No. 2748

(Letterhead of American Tobacco Company, Incorporated)

JANUARY 27, 1921.

SPECIAL SHIPMENTS FROM JOBBERS' STOCK 100
SWEET CAPORAL CIGARETTES 108 FREE

TO OUR JOBBING CUSTOMERS:

Effective at once, and for a limited time, with each twelve cartons of one or more of our listed brands of Cigarettes, Little Cigars, Cigarette Papers, Smoking or Chewing Tobacco shipped from your stock at one time to one retailer you may include:

FREE: 100 SWEET CAPORAL CIGARETTES, 10s BOX

PROVIDED: ONE CARTON OR MORE OF "111" (ONE-ELEVEN) CIGARETTES IS INCLUDED IN EACH TWELVE CARTON SHIPMENT.

Every dealer will take advantage of this Offer, and it is suggested that you immediately place your order for SWEET CAPORAL CIGARETTES 10s BOX and "111" (ONE-ELEVEN) 1310 CIGARETTES; also be sure that you have on hand a sufficient stock of all our other brands.

This Offer is subject to the following conditions:

1. YOU MUST PURCHASE DURING THE LIFE OF THIS OFFER AT LEAST AN EQUAL QUANTITY OF THE BRANDS OF OUR MANUFACTURE WHICH YOU REPORT AS HAVING SOLD AND SHIPPED TO RETAILERS UNDER THIS OFFER.
2. YOU MUST PURCHASE DURING THE LIFE OF THIS OFFER AS MANY SWEET CAPORAL CIGARETTES 10s BOX AS YOU GIVE AWAY.
3. THIS OFFER DOES NOT APPLY ON CIGARS BOUGHT FOR THE STOCKS OF OUR DIRECT CUSTOMERS OR SUBSIDIARIES OR ON SHIPMENTS TO THE RETAIL DEPARTMENTS OF EITHER, BUT IS FOR THE BENEFIT OF RETAILERS ONLY.
4. WE RESERVE THE RIGHT TO REFUSE TO HONOR ANY REPORTS OF SHIPMENTS WHICH SEEM TO US TO BE OF AN EXCESSIVE OR SPECULATIVE NATURE.
5. WE WILL NOT ALLOW THE GRATIS TO ANY CUSTOMER WHO REPORTS SHIPMENTS OTHER THAN THOSE ACTUALLY MADE.
6. THIS OFFER IS MADE FOR THE BENEFIT OF bona fide RETAIL DEALERS LOCATED ONLY IN PHILADELPHIA COUNTY, PA., AND WE WILL 1310 NOT ISSUE CREDIT TO ANY OF OUR CUSTOMERS FOR GRATIS ON SHIPMENTS TO ANY RETAIL DEALERS OTHER THAN THOSE LOCATED IN PHILADELPHIA COUNTY, PA.

We are sending under separate cover forms on which you are to make reports of your shipments under this Order.

All shipments must be reported to us within ten days of date of sale. A separate report must be made for each shipment and must show the number of cartons of each brand included in the shipment, also the quantity of SWEET CAPORAL CIGARETTES 10s BOX given as gratis with each shipment.

As soon as your reports are received and audited we will send you credit memorandum for as many SWEET CAPORAL CIGARETTES 10s BOX as you have given away during the life of this Offer.

All orders are subject to acceptance by our New York Office and to prices and styles in effect at our factory on date of shipment.

No representative or employee of this Company has authority to change any circular, letter or price list issued by this Company.

Very respectfully,

THE AMERICAN TOBACCO COMPANY
incorporated.

1311

RESPONDENT'S EXHIBIT No. 5

MARCH 19, 1921.

Messrs. MURPHY BROS.,

Camden, N. J.

GENTLEMEN: It has been called to my attention that there has been a number of report forms covering sales made by you under our recent offer, as outlined in circular 2748, either returned to you or being held at this office for the reason that the deal was sold by you to sub-jobbers.

I understand that, according to your association agreement, there are no recognized sub-jobbers in the city of Philadelphia, and I further understand that you treated all so-called sub-jobbers on exactly the same basis as you did the retail trade, considering them only in the sense of a retail merchant and sold according to your agreed price, at list less 8%.

If my understanding of this matter is correct and you will advise me that these so-called sub-jobbers were sold as retail merchants, on receipt of your advice I will be very glad to issue proper instructions to see that you are reimbursed for all such orders sold and delivered by you.

Very truly yours,

SALES MANAGER.

J. B. BEVILL.

MM.

1312

RESPONDENT'S EXHIBIT No. 6

(American Tobacco Co.)

Murphy Brothers, Fine Imported and Domestic Cigars, N. E. Cor.
2nd and Market Streets

CAMDEN, N. J., March 30th, 1921.

Mr. J. B. BEVILL,

The American Tobacco Co.,

111 Fifth Ave., New York, N. Y.

DEAR SIR: We are in receipt of your letter of the 19th inst.; and contents of same has been carefully noted by the writer and in reply I am pleased to advise you that we do not recognize any dealers in

Philadelphia as sub-jobbers; they are all retailers and are recognized by us as such.

Trusting this is the information desired and thanking you, I am,
Yours, very truly,

(Signed) JAMES MURPHY.

1315

RESPONDENT'S EXHIBIT No. 7

FEDERAL TRADE COMMISSION.

GENTLEMEN: We beg to acknowledge receipt of your letter of May 29 enclosing Docket No. 886 and other pamphlets. In compliance with your request we reply thereto to the best of our knowledge and belief giving categorical answers to allegations in your complaint.

We joined the Wholesale Tobacco and Cigar Dealers Association of Philadelphia to contribute to the welfare of local trade. Incidentally, no member or representative of our firm has ever attended a meeting of the association.

ANSWERS

(a) (b) (c) Upon one occasion we received a notice from the association suggesting a certain discount to the jobbing trade on cigarettes, which permitted of a reasonable, though small, profit on such sales. For a time we complied with this schedule of prices but finding a general practice among the wholesalers to increase this discount (reducing price to jobber) we were forced to compete and meet conditions.

(d) Since receipt of notice above referred to we have never received any communication (except notices of regular meetings) from the association either in writing or in any manner.

We have never been persuaded or intimidated; neither have we attempted to persuade, intimidate, or dictate to others, nor to our knowledge has such an effort been made.

(e) We have no knowledge of the cooperation of respondent manufacturers engaging in the alleged persuasion and (or) intimidation and have continued to manage our business in our own way without dictation from either the respondent association or manufacturers.

(f) (g) (h) We have not engaged in the practices alleged in these paragraphs and are ignorant of any such action on behalf of or by the association or manufacturers. If any such action was taken at a meeting of the association we have received no report of it.

GENERAL REMARKS

We presume the complaints refer entirely to the handling of cigarettes which department of our business is conducting for the convenience of customers and for the purpose of holding our trade in imported, Tampa, and domestic cigars. We do not seek business on cigarettes as the margin of profit is so small it ceases to interest us.

We have, however, experience in the handling of cigarettes
 1315 a direct restraint and obstacle to trade by the ability alleged
 by our customers to purchase cigarettes at prices below the
 manufacturers' price. It is reported to us that such purchases can
 be made from the excess stocks purchased by the Government during
 the war. The restraint of trade caused by this condition is the
 only restraint or form of intimidation we have suffered from or
 experienced.

We respectfully pray your honorable commission to remedy this
 evil and shall cheerfully cooperate with you in the endeavor to in-
 sure to the wholesaler a reasonable living profit on cigarettes.

Respectfully yours,

EXHIBIT A TO TESTIMONY OF BAIL

Circular No. 1350

(Letterhead of P. Lorillard Company)

MAY 25, 1921.

To Our Customers:

The 10% discount from our list price allowed all jobbers on our
 tobacco line is what we consider a fair and legitimate profit, ac-
 cruing to the jobber for handling and distributing our goods.
 1316 Long business usage has confirmed the fairness of this ar-
 rangement.

Knowing that a reasonable profit is essential to the success of any
 business and that only successful jobbers are satisfactory and de-
 pendable distributors, we feel that it is good business for us to urge
 the jobber to sell our brands at prices that will not prove an injury
 to our valuable trade-marks. Where the jobber persists in disre-
 garding our policy in such matters, it is logical for us to conclude
 that he is willing to sacrifice our business welfare for his own self-
 ish interest.

We believe you will agree with us that it would be a very short-
 sighted policy to continue to supply such firms with the means of
 demoralizing our accustomed channels of distribution.

We trust it will be your pleasure to cooperate with us in pre-
 venting that which is undesirable.

All orders subject to acceptance by our New York office, and if
 accepted will be filled at prices ruling on day of shipment.

No representative or employee of this company has authority to
 change any circular, letter, or price list issued by this company.

Yours respectfully,

P. LORILLARD COMPANY, INCORPORATED.

Mailed to West Virginia ONLY.

EXHIBIT B TO TESTIMONY OF BALL

Circular No. 1360

(Letterhead of P. Lorillard Company)

JUNE 29, 1921.

To Our Customers:

The 10% discount from our list price allowed all jobbers on our tobacco line is what we consider a fair and legitimate profit, accruing to the jobber for handling and distributing our goods.

Long business usage has confirmed the fairness of this arrangement.

Knowing that a reasonable profit is essential to the success of any business and that only successful jobbers are satisfactory and dependable distributors, we feel that it is good business for us to urge the jobber to sell our brands at prices that will not prove an injury to our valuable trade-marks. Where the jobber persists in disregarding our policy in such matters, it is logical for us to conclude that he is willing to sacrifice our business welfare for his own selfish interest.

We believe you will agree with us that it would be a very short-sighted policy to continue to supply such firms with the means of demoralizing our accustomed channels of distribution.

All orders subject to acceptance by our New York office, and if accepted will be filled at prices ruling on day of shipment.

towns in Indiana

1318 No representative or employee of this company has authority to change any circular, letter, or price list issued by this company.

Yours respectfully,

P. LORILLARD COMPANY, INCORPORATED.

Mailed to Ohio ONLY.

EXHIBIT C TO TESTIMONY OF BALL

Circular No. 1360

(Letterhead of P. Lorillard Company)

JULY 6, 1921.

To Our Customers:

The 10% discount from our list price allowed all jobbers on our tobacco line is what we consider a fair and legitimate profit, accruing to the jobber for handling and distributing our goods.

Long business usage has confirmed the fairness of this arrangement.

Knowing that a reasonable profit is essential to the success of any business and that only successful jobbers are satisfactory and dependable distributors, we feel that it is good business for us to

1319 urge the jobber to sell our brands at prices that will not prove an injury to our valuable trade-marks. Where the jobber persists in disregarding our policy in such matters, it is logical for us to conclude that he is willing to sacrifice our business welfare for his own selfish interest.

We believe you will agree with us that it would be a very short-sighted policy to continue to supply such firms with the means of demoralizing our accustomed channels of distribution.

All orders subject to acceptance by our New York office, and if accepted will be filled at prices ruling on day of shipment.

No representative or employee of this company has authority to change any circular, letter, or price list issued by this company.

Yours respectfully,

P. LORILLARD COMPANY, INCORPORATED.

Mailed to Michigan and
Jobbers located in six

1320 EXHIBIT D TO TESTIMONY OF BALL

Circular No. 1363

(Letterhead of P. Lorillard Company)

JULY 21, 1921.

To Our Customers:

The 10% discount from our list price allowed all jobbers on our tobacco line is what we consider a fair and legitimate profit, accruing to the jobber for handling and distributing our goods.

Long business usage has confirmed the fairness of this arrangement.

Knowing that a reasonable profit is essential to the success of any business and that only successful jobbers are satisfactory and dependable distributors, we feel that it is good business for us to urge the jobber to sell our brands at prices that will not prove an injury to our valuable trade-marks. Where the jobber persists in disregarding our policy in such matters, it is logical for us to conclude that he is willing to sacrifice our business welfare for his own selfish interest.

We believe you will agree with us that it would be a very short-sighted policy to continue to supply such firms with the means of demoralizing our accustomed channels of distribution.

All orders subject to acceptance by our New York office, and if accepted will be filled at prices ruling on day of shipment.

1321 No representative or employee of this company has authority to change any circular, letter, or price list issued by this company.

Yours respectfully,

P. LORILLARD COMPANY, INCORPORATED.

Mailed to Ark—Colo—Idaho

Indiana—Iowa—Kansas—Kentucky

Louisiana—Minnesota—Missouri—Montana

Nebraska—New Mexico—No. Dakota—Okla

So. Dakota—Texas—Utah—Wyoming.

EXHIBIT E TO TESTIMONY OF BALL

(Letterhead of P. Lorillard Company)

August 3, 1921.

To Our Customers:

Having received many inquiries from jobbers generally as to what the attitude of this company is in reference to the jobber receiving a legitimate profit for handling and distributing merchandise of this company's manufacture, we beg to quote herewith letter sent out on May 25, 1921, to many sections, which outlines our position, we think, quite clearly:

1322

MAY 25, 1921.

To Our Customers:

The 10% discount from our list price allowed all jobbers on our tobacco line is what we consider a fair and legitimate profit, accruing to the jobber for handling and distributing our goods.

Long business usage has confirmed the fairness of this arrangement.

Knowing that a reasonable profit is essential to the success of any business and that only successful jobbers are satisfactory and dependable distributors, we feel that it is good business for us to urge the jobber to sell our brands at prices that will not prove an injury to our valuable trade-marks. Where the jobber persists in disregarding our policy in such matters, it is logical for us to conclude that he is willing to sacrifice our business welfare for his own selfish interest.

We believe you will agree with us that it would be a very short-sighted policy to continue to supply such firms with the means of demoralizing our accustomed channels of distribution.

All orders subject to acceptance by our New York office, and if accepted will be filled at prices ruling on day of shipment.

No representative or employee of this company has au-
1323 thority to change any circular, letter or price list issued by this company.

Yours respectfully,

P. LORILLARD COMPANY, INCORPORATED.

Since the issuance of this circular other manufacturers, we are pleased to see, have taken quite a similar action with a view to pointing out to the jobber the importance of bringing about a betterment of selling conditions existing in different sections of the country.

We now wish to advise that any move to better selling conditions in your section will, in so far as we can properly and lawfully assist, have our hearty support and approval.

Yours respectfully,

P. LORILLARD COMPANY, INCORPORATED.

Mailed to Arizona—California—Delaware
Dist. of Col.—Illinois—Maine—Maryland
Massachusetts—Nevada—New Hampshire
Oregon—Penn.—Rhode Island—Vermont
Washington—Wisconsin—Southern New Jersey
Connecticut except Stamford
New York except Met. Dist.

The following are copies of the exhibits in Docket 909, which were admitted and referred to in connection with the testimony of David H. Ball and which were made a part of this case by agreement between counsel. (See page —)

1324 COMMISSION'S EXHIBIT 70—DOCKET 909
(Referred to on page 1061)

P. LORILLARD COMPANY,
119 West 40th Street, New York, May 20, 1921.

MR. GEORGE O. FENNELL,
2825 Woodburn Avenue, Cincinnati, Ohio.

DEAR SIR: There seems to be a general movement throughout the country on the part of the jobbers—and we have recently been advised it has extended to Cincinnati—to secure a fair margin of profit for handling tobacco products.

This company does not assume to tell you at what price you shall sell its merchandise after you have paid for it, but we are providing a trade allowance of 10% to the jobbers and it is exceedingly discouraging to find so many of them are inclined to give an excessive portion of it away.

We believe the tobacco business as a whole—and the manufacturer's, jobber's, and retailer's interest individually—is best served when our goods are being sold by each and every one of them at the prices intended.

We trust it will be your pleasure to co-operate with the movement on our line of merchandise.

1325 May we not hear from you in reference to the above subject?

With kind regards, we beg to remain,

Yours, very truly,

(Signed) D. H. BALL,
Vice President.

COMMISSION'S EXHIBIT 71—DOCKET 909

(Referred to on page 1062)

P. LORILLARD COMPANY,
119 West 40th Street, New York, May 20, 1921.

MR. AUGUST JANZEN, JR.,
% The Janzen Gro. Company, S. E. Cor. 2nd & Walnut
Streets, Cincinnati, Ohio.

DEAR SIR: There seems to be a general movement throughout the country on the part of the jobbers—and we have recently been ad-

vised it has extended to Cincinnati—to secure a fair margin of profit for handling tobacco products.

This company does not assume to tell you at what price you shall sell its merchandise after you have paid for it, but we are providing a trade allowance of 10% to the jobbers and it is exceedingly discouraging to find so many of them are inclined to give an excessive portion of it away.

We believe the tobacco business as a whole—and the manufacturer's, jobber's, and retailer's interest individually—is best served when our goods are being sold by each and every one of them at the prices intended.

We trust it will be your pleasure to cooperate with the movement on our line of merchandise.

May we not hear from you in reference to the above subject?

With kind regards, we beg to remain,

Yours very truly,

(Signed)

D. H. BALL,
Vice President.

1327

COMMISSION'S EXHIBIT 73—DOCKET 909

(Referred to on page 1079)

JULY 8, 1921

P. LORILLARD CO.,

119 West 40th St., New York City.

GENTLEMEN: Of late we have been offering tobaccos and cigarettes of your manufacture to the retail trade at the regular list price, we retaining the 10% jobbers' discount. Some of the larger retailers, some of the manufacturers and grocery companies composed of various retailers have been selling goods at a cut price and we have been losing considerable business on account of our trying to maintain the regular list, and we would like an expression from your company as to whether you would object to our using our own good judgment in furthering the sale of your products.

In other words, where we sell tobaccos and cigarettes in a small way we intend to maintain the regular list price but where we get quantity orders we want to make an allowance for such large business. Kindly let us hear from you.

Yours, very truly,

THE JANSSEN GROCERY CO.

BCS.

1238

COMMISSION'S EXHIBIT 74—DOCKET 909

(Referred to on page 1079)

P. LORILLARD COMPANY,
119 West 40th Street, New York, July 11, 1921.

THE JANSZEN GROCERY COMPANY,

S. E. Cor. Second and Walnut Streets,
Cincinnati, Ohio.

GENTLEMEN: We beg to acknowledge receipt of your favor of July 8th, and in reply enclose herewith circular, copy of which was sent to every distributor in the State of Ohio, which fully sets forth our position in this matter.

With kind regards, we beg to remain,

Yours very truly,

(Signed)

D. H. BALL,
Vice President.

1239

COMMISSION'S EXHIBIT 122—DOCKET 909

(Copy)

DEAR SIR: It has come to our attention that you are not selling our products so as to realize the margin of profit which our price list affords you, and that your so doing is very much demoralizing the trade and injuring our business. This we greatly regret.

Of course, you have a right to continue selling the products we may have sold you at such prices as you desire, and we are not intimating or seeking any arrangement or understanding whatever which will in anywise qualify or restrict you in this right. We are bringing the matter to your attention merely in the natural endeavor to protect in all legitimate ways that we can the brands which it has cost us so much time, thought, and money to establish, in the hope that upon reflection you will come to the conclusion that it is to the best interest of you as well as of ourselves that you realize the profit which our price list offers you.

Yours very truly,

1240

COMMISSION'S EXHIBIT 123—DOCKET 909

(Copy)

DEAR SIR: It has come to our attention that you are selling our products in a way that is demoralizing the trade and injuring our business. This we greatly regret.

Of course, you have a right to continue selling the products at such prices as you desire, and we are not intimating or seeking any arrangement or understanding whatever which will in anywise qualify or restrict you in this right. We are bringing the matter to your

attention merely in the natural endeavor to protect in all legitimate ways that we can the brands which it has cost us so much time, thought, and money to establish, in the hope that upon reflection you will come to the conclusion that it is to the best interest of you as well as of ourselves that you realize the profit which our price list offers you.

Yours very truly,

1331

COMMISSION'S EXHIBIT 124—DOCKET 909

Aug. 24th, 1921.

P. LORILLARD COMPANY,

New York City, N. Y.

GENTLEMEN: We beg to report that a concern operating under the name of the Jefferson Supply Company, 224 Pearl St., LaCrosse, Wis., is quoting out a number of your brands of cigarettes and tobaccos at exceedingly low prices. They require cash with order f. o. b. LaCrosse.

They offer 10 foil Union Leader at 89¢, 10 plug Smooth Climax at \$6.68, etc. We are wondering whether or not there is any means by which you can influence the above concern to observe the customary prices on your products in this section of the country.

Any consideration which you afford this matter, will be highly appreciated.

Very truly yours,

O. J. MOORE GROCER COMPANY,

By

COG:L

1332

COMMISSION'S EXHIBIT 125—DOCKET 909

P. Lorillard Company, Incorporated, Tobacco, Cigarettes, Cigars,
119 West 40th Street

New York, August 29, 1921.

Mr. C. O. GOODNOW,

*c/o O. J. Moore Grocer Company,**Sioux City, Iowa.*

DEAR SIR: We have been working on the subject matter of your favor of August 24th for the past ten days, and are pleased to advise that the parties referred to will, commencing this day, sell our products on a basis that will show them a legitimate profit.

Wisconsin has been a little slow in lining up, but believe from now on you will experience no difficulty from this source.

With kind regards, we beg to remain,

Yours very truly,

(Signed)

D. H. BALL,

Vice-President.

1333

COMMISSION'S EXHIBIT 126—DOCKET 909

(Reynolds No. 233)

(Copy)

CINCINNATI, OHIO, Aug. 29, 1921.

Mr. BOWMAN GRAY, *Vice Pres.*,*R. J. Reynolds Tobacco Co., Winston Salem, N. C.*

MY DEAR MR. GRAY: The jobbing interests of Ohio, Kentucky, Indiana, and W. Virginia are now maintaining the regular jobbing price on tobaccos and cigarettes. I refer to legitimate jobbers who make it their business to handle a full line of merchandise without favor to any one particular manufacturer.

There are a few who are not recognized as jobbers and who handle one line only. These people are doing what they can to break down the morale of the legitimate jobber and in their efforts to secure a sale are making the charge that "The R. J. Reynolds Tobacco Company have instructed them to handle their product at any price or concession they might choose."

I do not believe this to be the attitude of your company, nor can I persuade myself to believe that you have authorized either of your representatives to make such a statement.

1334 I do know, however, that your employees with whom I have conversed are not in sympathy with this movement; this may also be the attitude of the company, but I trust this is not so. If you are in sympathy with this movement for maintenance of prices which has now become nation-wide, can I ask that you lend us your support by placing before your direct customers such a letter as has been mailed by your competitors, thereby demonstrating that the R. J. Reynolds Tobacco Co. have faith enough in the merit of their product that they will continue their successful sale on an equal basis with any and all competition.

Very truly yours,

J. E. CUNE.

JC.

COMMISSION'S EXHIBIT 127—DOCKET 909

(Reynolds No. 234)

(Copy)

WINSTON-SALEM, N. C., Sept. 1, 1921.

Mr. HENRY STRAUS,

Cincinnati, Ohio.

DEAR SIR: Answering your letter of August 29th, addressed to our Mr. Bowman Gray, it is a pleasure to assure you that it
1335 has always been the policy of this company to encourage among the jobbers of its product everything that tends to the uplift of the tobacco business. We have no desire to review herein

the many ways in which we feel that we have in the years gone by made the jobbing business more profitable to the jobber. We are perfectly willing for that record to speak for itself. We expect to continue to show ourselves, as in the past, sincere friends of our customers, and we stand ready to cooperate with you fully in every proper move consistent with good business.

It is unquestionably the right and privilege of the individual jobber and the retailer to adopt for himself such merchandising policies as may seem to him to be best, provided they be lawful. Neither the manufacturer nor any other person or group of persons can rightfully do anything to control the decision of the jobbers and retailers in this respect, or to dictate their choice as between lawful policies. We do not regard it as the part of wisdom or of candor to promise the adoption of any specific course of action until after careful consideration we have assured ourselves that such course of action would advance the policies above outlined, and that the same would be lawful and consistent with the rights of all concerned.

Since improvident promises can be productive of nothing but excuses for their nonperformance, we have assumed that you are not any more interested in having them than we are in making them; and we feel sure that on mature consideration you will not question the propriety of our thus candidly stating the situation in a spirit which, among other things, fully recognizes the embarrassment which might result to some of our friends from the pursuit of another policy than that which we have outlined.

With best wishes, we are,

Yours very truly,

R. J. REYNOLDS TOBACCO COMPANY.

Sales department.

rrp-l.

ccm PPD MAIL.

1337

Before Federal Trade Commission

[Title omitted.]

Stipulation in re admission of certain exhibits

Subject to the approval of the Federal Trade Commission, it is hereby agreed by and between W. H. Fuller, chief counsel of the said commission, and John Walsh, attorney for the American Tobacco Company, one of the respondents herein, that the papers marked during the taking of the testimony herein, "Exhibits for Identification Nos. 31, 33, 34, 35, 36, 37, 38, and 39," respectively, be, and the same are hereby, admitted in evidence, and that the respective exhibit numbers of such papers be, and they are hereby, made the same as the numbers given to such papers, respectively, as exhibits for identification.

(Signed) JOHN WALSH,
Attorney for American Tobacco Co.

(Signed) W. H. FULLER.

MARCH 29, 1923.

1338

Before Federal Trade Commission

[Title omitted.]

Order of dismissal as to P. Lorillard Company

Feb. 16, 1924

This proceeding having come on for hearing before the Federal Trade Commission upon the complaint of the commission, the answers of the respondents and the testimony and evidence, 1239 and the commission being fully advised in the premises,

It is ordered that the complaint herein be and the same is hereby dismissed as against respondent P. Lorillard Company.

[SEAL.]

(Signed)

OTIS B. JOHNSON,

Secretary.

1340

Findings as to facts and conclusion

BEFORE FEDERAL TRADE COMMISSION

[Title omitted.]

Feb. 16, 1924

Pursuant to the provisions of an act of Congress approved September 26, 1914, entitled, "An act to create a Federal Trade Commission, defining its powers and duties and for other purposes," the Federal Trade Commission issued and served a complaint upon the respondents, the Wholesale Tobacco & Cigar Dealers 1341 Association of Philadelphia, Pennsylvania, its officers, directors and members as follows: Nelson F. Eberbach, president; Harvey D. Narrigan and James Murphy, vice presidents; Herman J. Krull, treasurer; Paul L. Brogan, secretary, respectively; Arthur Shipton, Frank Kuhn, William Cohen, Bennett Hollard, Frank Blatt, H. Stewart Moorhead, Philip Godeski, William D. Shepherd and Morris Hochman, its directors, and the following members: Nelson F. Eberbach, John S. Eberbach and Joseph H. Eberbach, partners, doing business under the name and style A. B. Cunningham & Company; Dusel, Goodloe & Company, Incorporated, a corporation; Philip Godeski and Sidney G. Godeski, partners doing business under the name and style Franklin Tobacco Company; Frank Kuhn, George Kuhn and John Kuhn, partners doing business under the name and style F. Kuhn & Brother; Peter J. Murphy and John Murphy, partners, doing business under the name and style Peter J. Murphy Company; Charles A. Krull and Herman Krull, partners, doing business under the name and style Charles A. Krull;

Baum & Neely, Incorporated, a corporation; William F. Shepherd and John G. Shepherd, partners doing business under the name and style S. Shepherd's Sons; T. H. Hart and A. I. Mitchell, partners, doing business under the name and style T. H. Hart & Company; F. Hartman & Son, a corporation; Yahn & McDonnell Company, a corporation; M. Blumenthal, John Wagner and Joseph W. 1342 Wagner, partners, doing business under the name and style of John Wagner & Sons; Harvey D. Narrigan, an individual doing business under the trade name H. D. Narrigan & Company; Victor Fermani; Anna E. Bechtold, an individual, doing business under the trade name James S. Bechtold; Frank Blatt, Arthur Shipton and Thomas F. Cooper, partners, doing business under the name and style Shipton & Payne Company; H. S. Moorhead, an individual, doing business under the trade name Duncan & Moorhead; Bennett Hollard, P. Hochman, M. J. Dalton Company, a corporation; Brucker & Boghein, Incorporated, a corporation; Fred G. H. Woerner, an individual, doing business under the trade name Fred G. H. Woerner & Sons; S. T. Banham and A. L. Banham, partners, doing business under the name and style S. T. Banham & Brothers; E. Cohen and William Cohen, partners, doing business under the name and style E. Cohen & Sons; John Murphy and James Murphy, partners, doing business under the name and style Murphy Brothers; American Tobacco Company, a corporation, and P. Lorillard Company, a corporation, charging them and each of them with the use of unfair methods of competition in commerce in violation of the provisions of said act.

Respondents John Wagner and Joseph W. Wagner, trading as John Wagner & Sons, filed their joint answer denying the use of the methods of competition charged in the complaint; respondent

M. J. Dalton Company filed its answer averring that for at 1343 least four months prior to the service of said complaint the

Wholesale Tobacco & Cigar Dealers Association of Philadelphia had been practically abandoned and that from that time to the filing of said answer there had been no associated action, agreement, resolution, or understanding between said association and the officers and among members thereof, or any of them in connection with the business of buying and selling cigars, cigarettes and other tobacco products; excepting Yahn & McDonnell Company, Baum & Neely, Inc., John Murphy and James Murphy, partners, doing business under the name and style of Murphy Brothers (none of whom filed answers), all the other respondent members, officers and directors of the Wholesale Tobacco & Cigar Dealers Association of Philadelphia, and the said Wholesale Tobacco & Cigar Dealers Association of Philadelphia, filed their joint answer averring that for at least four months prior to the filing of the complaint the Wholesale Tobacco & Cigar Dealers Association of Philadelphia had been practically abandoned and that since that time to the filing of said joint answer there had been no associated action agree-

ment, resolution, or understanding between said association and the officers and members thereof, or among the members thereof, or any of them in connection with the business of buying and selling cigars, cigarettes, and other tobacco products, respondents American Tobacco Company and P. Lorillard Company filed their separate answers denying the use of the methods of competition charged in the complaint.

1344 Thereupon hearings were had and evidence was thereupon introduced in support of the allegations of said complaint and on behalf of the respondents before George McCorkle, Esq., an examiner of the Federal Trade Commission theretofore duly appointed and thereupon this proceeding came on for final hearing and the commission having heard argument of counsel and having duly considered the record (the testimony having been reduced to writing and filed in the office of said commission) and being now fully advised in the premises, makes this its findings as to the facts and conclusion, (except that the proceeding having been dismissed as to the P. Lorillard Company, the Federal Trade Commission does not make any findings as to the facts as against P. Lorillard Company).

FINDINGS AS TO THE FACTS

PARAGRAPH ONE: Respondent, Wholesale Tobacco & Cigar Dealers Association of Philadelphia, Pennsylvania, was a voluntary, unincorporated association organized in the year 1920 and existing until at least June 9, 1922. It was composed of various individuals, partnerships and corporations engaged in the business of selling tobacco and tobacco products at wholesale to wholesale and retail dealers in the State of Pennsylvania and in the neighboring states, and, in some instances, doing a retail business in said commodities in
1345 addition to said wholesale business. Said association will be hereinafter referred to as the association.

The original officers of the association elected on September 2, 1920, were the following respondents: Nelson F. Eberbach, president; Harvey D. Narrigan, vice president; James Murphy, vice president; Herman J. Krull, treasurer; Paul L. Brogan, secretary; and Arthur Shipton, Frank Kuhn, William Cohen, Bennett Holland, Frank Blatt, H. Stewart Moorhead, Philip Godeski, William D. Shepherd, and M. Hochman, directors. Such respondents remained and continued as such officers of the association from September 2, 1920, until at least January 6, 1922, except that respondent, William Fink, on June 6, 1921, was elected second vice president in place of respondent James Murphy and said respondent, William Fink, continued as such vice president from June 6, 1921, until at least January 6, 1922.

At a meeting of the association held September 2, 1920, the following committees were appointed, viz:

Executive committee: Respondents, H. Stewart Moorhead, chairman; Frank Kuhn, John Murphy, Philadelphia, Philip Godeski, and William Cohen.

Finance committee: Respondents, M. Hochman, chairman; L. Fink, and James Bechtold.

Membership committee: Respondents, Arthur Shipton, chairman; F. Hartmann, and Myer Blumenthal.

1346 These respondents continued as members, respectively, of the executive committee, finance committee, and membership committee until at least January 6, 1922.

The membership of the association comprised all of the wholesale tobacco and cigarette dealers in Philadelphia and Camden, N. J., except Charles Seider and Fringes Sons.

The following named respondents with their several principal places of business in the city of Philadelphia, State of Pennsylvania, were at all times hereinafter mentioned and still are engaged in selling cigarettes and other tobacco products at wholesale to wholesale and retail dealers in the several States of the United States. They caused said products when so sold to be transported from their respective places of business in the said city of Philadelphia to purchasers thereof in the various States of the United States:

(a) Nelson F. Eberbach, John S. Eberbach, and Joseph H. Eberbach, partners doing business under the name and style of A. B. Cunningham & Company; Dusel, Goodloe & Company, Incorporated, a corporation organized under the laws of the State of New Jersey; Philip Godeski and Sidney G. Godeski, partners, doing business under the name and style Franklin Tobacco Company; Peter J. Murphy and John Murphy, partners, doing business under the name and style Peter F. Murphy Company; Charles A. Krull and Herman

1347 Krull, partners, doing business under the name and style Charles A. Krull; William D. Shepherd and John G. Shepherd, partners, doing business under the name and style of S. Shepherd's Sons; T. H. Hart and A. I. Mitchell, partners, doing business under the name and style T. H. Hart & Company; Yahn & McDonnell Company, Incorporated, a corporation organized under the laws of the State of Pennsylvania; M. Blumenthal; John Wagner and Joseph Wagner, partners, doing business under the name and style of John Wagner & Sons; Harvey D. Narrigan, an individual, doing business under the trade name H. D. Narrigan & Company; Victor Fermari; Bennett Hollard; P. Hochman; M. J. Dalton Company, a corporation organized under the laws of the State of Pennsylvania; Brucker & Boghien, Incorporated, a corporation organized under the laws of the State of Pennsylvania; S. T. Banham and A. L. Banham, partners, doing business under the name and style S. T. Banham & Brothers; E. Cohen and William Cohen, partners, doing business under the name and style E. Cohen & Sons.

The following named respondents with their several places of business in the city of Philadelphia, State of Pennsylvania, were at all times hereinafter mentioned and still are engaged in the business of selling cigarettes and other tobacco products at wholesale to wholesale and retail dealers wholly within the State of Pennsylvania:

(b) Frank Kuhn, George Kuhn, and John Kuhn, partners, 1348 doing business under the name and style of F. Kuhn & Brothers; Baum & Neely, Incorporated, a corporation organized under the laws of the State of Pennsylvania; Anna E. Bechtold, an individual doing business under the trade name James S. Bechtold; Frank Blatt; Arthur Shipton and Thomas F. Cooper, partners, doing business under the name and style Shipton & Payne Company; H. S. Moorhead, an individual, doing business under the trade name of Duncan & Moorhead; Fred G. H. Woerner, an individual, doing business under the trade name Fred G. Woerner & Sons.

The following named respondents with their several principal places of business in the city of Camden, State of New Jersey, were at all times hereinafter mentioned and still are engaged in the business of selling cigarettes and other tobacco products at wholesale to wholesale and retail dealers in the several States of the United States, particularly in Camden, N. J., and Philadelphia, Pennsylvania. They caused, and at all times hereinafter mentioned caused, such cigarettes and tobacco products, when so sold by them, to be transported from their respective places of business in the city of Camden, N. J., to purchasers in various States of the United States, particularly in the States of New Jersey and Pennsylvania:

(c) F. Hartmann & Son, a corporation organized under the laws of the State of New Jersey; John Murphy and James Murphy, 1349 partners doing business under the name and style Murphy Brothers.

All of the foregoing respondents whose names are set out in subparagraphs (a), (b), and (c) were at all times during the existence of the association members thereof and are hereinafter collectively referred to as the members, excepting that respondents, John Murphy and James Murphy, trading as Murphy Brothers, were expelled from the association in April, 1921, and John Wagner and Joseph W. Wagner, partners, trading as John Wagner & Sons, Yahn & McDonnell Company, and Baum & Neely, Inc., withdrew from the association some time after June, 1921. During the period of the existence of the association the members were naturally and normally in unrestricted competition with each other and with other dealers in the territory in which they sold, excepting insofar as such competition was limited, prevented, and suppressed by the acts and things done by them as more particularly hereinafter set out.

Respondent, American Tobacco Company, is a corporation organized, existing, and doing business under the laws of the State of

New Jersey with its principal office in Jersey City in said State and with factories in several States of the United States. It was at all times hereinafter mentioned and still is engaged in the manufacture of cigarettes and other tobacco products, and in the sale thereof to wholesale dealers throughout the United States. It caused,

during the period hereinafter mentioned, and still causes, 1350 its products, when so sold, to be transported from the point of manufacture to purchasers at points in other States of the United States. Among said purchasers were all of the respondents named in subparagraphs (a), (b), and (c). The said American Tobacco Company was at all times hereinafter mentioned and still is in competition with individuals, partnerships, and other corporations similarly engaged in the manufacture and sale of tobacco products in interstate commerce.

PARAGRAPH TWO: During the period of the existence of the association the prices at which the respondent, American Tobacco Company, sold its products were fixed as follows: It supplied each of the members with a schedule of prices, denominated list prices, which were the prices suggested by said American Tobacco Company at which its products should be resold by the members to other wholesalers and to the retail trade. The prices at which such products were sold to the members were fixed by certain uniform discounts off said list in each instance, whereby the members paid the manufacturers for said products said list prices minus said discounts. Wholesale and retail dealers in tobacco products throughout the United States, including the members, were, during the existence of the association, and still are, dependent upon the American Tobacco Company for their supply of the American Tobacco Company's products which constitute a large portion of the tobacco products dealt in by such wholesale and retail dealers.

1351 The extent of this dependence is such that when any dealer is unable to secure the products of the American Tobacco Company, his business is substantially crippled and he is placed at a competitive disadvantage with dealers supplied with said products.

On September 16, 1920, the association and its members, acting through the association and cooperating with it and with each other, agreed upon a schedule of fixed prices at which the members should thereafter resell to their dealer-customers the tobacco products dealt in by the members, including the products of the American Tobacco Company, and, having thus fixed such uniform resale prices, adopted a system for the maintenance and enforcement of said resale prices by the members and by all of the wholesale dealers in the trade who did business in the territory served by the members. In the course of said cooperative enforcement of said system the members and the association, through its officers and directors, did among other things, during the period from September 16, 1920, until the end of 1921, the following acts and things:

(a) Undertook among themselves to maintain said resale prices and did maintain same.

(b) Caused the fixation of said resale prices to appear as the formal action of the association by an appropriate resolution in that behalf.

(c) Caused the association to notify all members of said acts.

1352 (d) Sought by persuasion and intimidation to cause all dealers who sold in the general selling territory of the members, including those members who discontinued the maintenance of said resale prices in violation of their aforesaid undertaking so to do, to maintain said resale prices.

(e) Sought and secured the cooperation of the American Tobacco Company in such persuasion and intimidation, which said American Tobacco Company rendered by notifying its trade in the territory of the members, by circular letters and otherwise that the notifier would refuse to furnish further supplies of its products to any wholesale dealer who failed to resell such products at the prices fixed in the aforesaid letter, or implying the same in veiled language.

(f) Caused reports of the names of said dealers who failed to maintain said resale prices to be reported by the members and their salesmen, either directly to the association, or through the respective members in each instance to the association, and upon receiving such reports, in turn, reported the names of such offending dealers to the American Tobacco Company, requesting its assistance in the enforcement of said system by having said American Tobacco Company refuse to further supply said offending dealers with any of its products.

1353 (g) As a result of reporting said names to the American Tobacco Company and requesting its cooperation as set out in specification (f) hereof, secured the cooperation and assistance of the American Tobacco Company in that behalf, and said American Tobacco Company, upon receiving such information, proceeded to investigate said instances of price-cutting and upon finding that the offending dealer was cutting prices and refusing and failing to maintain the said resale prices, refused to furnish said offending dealer with further supplies of its products.

(h) Employed a special agent to spy upon the members and other dealers in the aforesaid territory in order to ascertain if any of them were failing to maintain said resale prices, and upon discovering that a member or dealer was so doing, to report the name of such offender to the association, which, upon receiving such reports, sought and secured the cooperation of the American Tobacco Company with regard to such offenders in like manner and with like results as set out in specifications (f) and (g).

PARAGRAPH THREE: During the period aforesaid in which the association adopted and maintained uniform resale prices for said American Tobacco Company's products in the manner and by the means set out in paragraph two hereof, it was the general
1354 policy of said American Tobacco Company to assist groups of

its jobbers who would fix or who had fixed by cooperation among themselves uniform resale prices on its products, by refusing shipments of its goods to such of its jobbers who had resold or who would resell at prices lower than those fixed by such jobbers by cooperation among one another. Such was the policy of said American Tobacco Company with respect to respondent association and its members. The representatives of said American Tobacco Company in the territory in which the members resold its products were instructed by their superiors to carry out such policy in Philadelphia and vicinity and because of such instructions such representatives carried out such policy.

Said American Tobacco Company knew of the price agreements made by the association and its members as described in paragraph two hereof and agreed with the said association and its members to help them maintain the price agreements described in paragraph two hereof.

Charles Seider, one of said American Tobacco Company's distributors in Philadelphia and a competitor of the members, having declined an invitation of the president and treasurer of the respondent association to join its membership, was urged by the division manager of the American Tobacco Company in charge of its Philadelphia territory, to join the association. Said division manager requested said Seider to join the association and not to sell at prices below those fixed by it and its members, but to comply with the uniform prices put into effect by the members and by the association as described in paragraph two hereof. Said Seider refused to join the association, or to abide by its prices, and the said American Tobacco Company, after investigating a complaint made to it by the association and its members that the said Seider was reselling its products at prices less than those fixed by the association and its members, discontinued selling to said Seider in the period from April 20, 1921, to August 13, 1921, for the purpose of assisting the association and its members to maintain the price agreements as described in paragraph two hereof. After said Seider, following the suggestion made to him by the said division manager that if he joined respondent association, it would help him get the shipments that had been withheld from him by said American Tobacco Company, applied to the vice president of the respondent association for membership therein, the said American Tobacco Company reinstated him as one of its customers and forwarded to him shipments that had been withheld in the period from April 20, 1921, to August 13, 1921.

Respondents John Murphy and James Murphy, partners doing business under the name and style Murphy Brothers, were expelled from the association in April, 1921, because they were accused by said association of reselling at prices less than those fixed by the association. The American Tobacco Company, after investigating complaints made to it by the association that said Murphy Brothers were reselling its products at prices less than

those fixed by the association and its members, discontinuing selling said Murphy Brothers in the period from August 29, 1921, to October 4, 1921, for the purpose of assisting the association and its members in maintaining the prices which had been fixed as set out in paragraph two hereof.

For the purpose of assisting the association and its members in maintaining the prices fixed by them as set out in paragraph two hereof, the American Tobacco Company in 1921, because of complaints made to it by the association and its members that respondents Fermani and Blumenthal were reselling its products at prices less than those fixed by the association and its members, withheld shipments of its products to said Fermani and Blumenthal while it was investigating the prices at which Fermani and Blumenthal were reselling its products.

PARAGRAPH FOUR: The aforesaid acts and things done by said respondents and each of them had the tendency and capacity to constrain all wholesale dealers doing business in the territory above mentioned to uniformly sell the aforesaid products to their dealer-customers at the prices fixed by the association and its members as hereinbefore set out, and hence to hinder and suppress all competition in the wholesaling of said products in said territory, particularly among the members of the association, and further to hinder and restrict competition between all retail dealers in said territory. Said respondents' practices thus tended to unduly hinder and obstruct the free and natural flow of commerce in the channels of interstate commerce.

CONCLUSION

The practices of said respondents under the conditions and circumstances described in the foregoing findings are unfair methods of competition in interstate commerce and constitute a violation of the act of Congress approved September 26, 1914, entitled "An act to create a Federal Trade Commission, to define its powers and duties and for other purposes."

By the commission:

[SEAL.]

(Signed)

HUSTON THOMPSON,

Chairman.

Dated this 16th day of February, A. D. 1924.

Attest:

(Sgd.)

OTIS B. JOHNSON, *Secretary.*

[Title omitted.]

1358

BEFORE FEDERAL TRADE COMMISSION

Order to cease and desist

Feb. 16, 1924

This proceeding having been heard by the Federal Trade Commission upon the complaint of the commission, the answers of

respondents, the testimony and evidence and the argument
 1359 of counsel, and the commission having made its findings as
 to the facts and having reached its conclusion that the respondents hereinafter named have violated the provisions of the act of Congress approved September 26, 1914, entitled, "An act to create a Federal Trade Commission, to define its powers and duties and for other purposes":

NOW THEREFORE, IT IS ORDERED that the Wholesale Tobacco & Cigar Dealers Association of Philadelphia, Pennsylvania, and its officers, directors and members as follows, Nelson F. Eberbach, president, Harvey D. Narrigan and James Murphy, vice presidents, Herman J. Krull, treasurer, Paul L. Brogan, secretary, respectively, Arthur Shipton, Frank Kuhn, William Cohen, Bennett Hollard, Frank Blatt, H. Stewart Moorhead, Philip Godeski, William D. Shepherd and Morris Hochman, its directors, and the following members, Nelson F. Eberbach, John S. Eberbach, and Joseph H. Eberbach, partners doing business under the name and style A. B. Cunningham & Company; Dusel, Goodloe & Company, Incorporated, a corporation, Philip Godeski, and Sidney G. Godeski, partners doing business under the name and style Franklin Tobacco Company, Frank Kuhn, George Kuhn and John Kuhn, partners, doing business under the name and style F. Kuhn & Brothers, Peter J. Murphy and John Murphy, partners doing business under the name and style Peter J. Murphy Company, Charles A. Krull and Herman Krull, partners
 1360 doing business under the name and style Charles A. Krull, Baum & Neely, Incorporated, a corporation, William F. Shepherd and John G. Shepherd, partners doing business under the name and style S. Shepherd's Sons, T. H. Hart and A. I. Mitchell, partners doing business under the name and style T. H. Hart & Company, F. Hartmann & Son, a corporation, Yahn & McDonnell Company, a corporation, M. Blumenthal, John Wagner and Joseph W. Wagner, partners doing business under the name and style of John Wagner & Sons, Harvey D. Narrigan, an individual doing business under the trade name H. D. Narrigan & Company, Victor Fermani, Anna E. Bechtold, an individual doing business under the trade name James S. Bechtold, Frank Blatt, Arthur Shipton and Thomas F. Cooper, partners doing business under the name and style Shipton & Payne Company, H. S. Moorhead, an individual doing business under the trade name Duncan & Moorhead, Bennett Hollard, P. Hochman, M. J. Dalton Company, a corporation, Brucker & Boghien, Incorporated, a corporation, Fred G. H. Woerner, an individual doing business under the trade name Fred G. H. Woerner & Sons, S. T. Banham and A. L. Banham, partners doing business under the name and style S. T. Banham & Brothers, E. Cohen and William Cohen, partners doing business under the name and style E. Cohen & Sons, John Murphy and James Murphy, partners doing business under the name and style Murphy Brothers, CEASE AND DESIST from fixing, en-

forcing and maintaining and from enforcing and maintaining, 1361 by combination, agreement, or understanding among themselves, or with or among any of them, or with any other wholesaler of cigarettes or other tobacco products, resale prices for cigarettes or other tobacco products dealt in by such respondents, or any of them, or by any other wholesaler of cigarettes or other tobacco products.

AND IT IS FURTHER ORDERED that The American Tobacco Company CEASE AND DESIST from assisting and from agreeing to assist any of its dealer-customers in maintaining and enforcing in the resale of cigarettes and other tobacco products manufactured by the said The American Tobacco Company, resale prices for such cigarettes and other tobacco products, fixed by any such dealer-customer by agreement, understanding or combination with any other dealer-customer of said The American Tobacco Company.

IT IS FURTHER ORDERED that all of said respondents and each of them shall file with the Federal Trade Commission, within sixty (60) days from the date of the service upon them of this order, a report in writing stating the manner and form in which this order has been conformed to.

By order of the commission: Commissioner Van Fleet dissenting in attached memorandum.

[SEAL.]

(Signed)

OTIS B. JOHNSON,

Secretary.

1362 BEFORE FEDERAL TRADE COMMISSION

[Title omitted.]

Dissent by Commissioner Van Fleet

I dissent in this case as to the order against the American Tobacco Company. The charge is that said company conspired with the Wholesale Dealers Association to maintain prices. The association was interested in maintaining the price that its members might obtain more for their goods. The object of the American Company was not the same as the association. The American Company sold its goods upon a ten per cent discount to the members of the association and its price was in no wise affected by the cutting of dealers. Of course this did not necessarily prevent the American Company from conspiring with the association, but it is a fact to be considered whether there was such conspiracy. If dealers were cutting prices and demoralizing the trade which at the time charged had proceeded to the extent of ruin if continued the American Company had a legal right to refuse to continue business dealings with such concerns. It is evident that a concern cannot stay in business if it

1363 sells at no profit as the evidence shows was the case here. The mere fact that the acts of the American Company were contemporaneous with those of the association is not determinative.

Of course conspiracy is often incapable of direct proof, but when resort is had to circumstantial evidence, as in this case, the proof should rise above the dignity of mere suspicion. Some of the evidence relied upon to sustain the order hardly ever rises to that dignity. Without summarizing the evidence, to my mind it appears that the truth is that the American Company had nothing to do with the organization of nor conduct of the association and I know of no proof to the contrary. Also I believe its acts were taken independently of the association and no real proof to the contrary appears. The commission dismissed the case against the Lorillard Company for lack of proof, and I believe that, eliminating evidence of acts of others for which the American Company was in no wise responsible and discarding mere conjecture, there is not proof to warrant an order against the American Company.

V. W. VAN FLEET,
Commissioner.

OCTOBER 30, 1923.

1364 BEFORE FEDERAL TRADE COMMISSION

Reports of respondents in re compliance with commission's order

(Received Feb. 19, 1924.)

Dusel, Goodloe & Co., Inc.
Importers and distributors standard brands cigars
112-114 North Seventh Street, Philadelphia

FEB. 18TH, 1924.

FEDERAL TRADE COMMISSION,
Washington, D. C.

GENTLEMEN: We are in receipt of your communication dated February 16th, 1924, and our reply is that to the best of our knowledge and belief the Wholesale Tobacco and Cigar Dealers Assn. of Phila. was disbanded and discontinued nearly two years ago and has not operated in any form whatsoever since that time; furthermore our company did not deal in cigarettes or tobaccos during the life of the association nor for several years prior and has not since.

This also answers your communication addressed to Paul L. Brogan, c/o Wholesale Tobacco and Cigar Dealers Assn.

Yours very truly,

DUSEL, GOODLOE & Co.

1365

(Received Feb. 19, 1924.)

JOHN WAGNER & SONS,

233 Dock Street, Philadelphia, February 17, 1924.

OTIS B. JOHNSON, Esq.,

Federal Trade Commission,

Washington, D. C.

SIR: We, the undersigned, trading as John Wagner & Sons, acknowledge your letter of the 16th instant and a copy of an "order to cease and desist," Docket No. 886, Federal Trade Commission.

Having in our testimony denied the use of the methods of competition charged in the complaint, we have the honor to advise you that we are continuing our business in compliance with the order of the commission.

Respectfully,

(Signed)

JOHN WAGNER.

JOSEPH WOOD WAGNER.

1366

(Received Feb. 27, 1924.)

[Title omitted.]

Nelson F. Eberbach, John S. Eberbach, and Joseph H. Eberbach, partners, doing business under the name and style of A. B. Cunningham & Co., hereby state in response to the order of the Federal Trade Commission dated February 16, 1924, as follows:

1. That Wholesale Tobacco & Cigar Dealers' Association of Philadelphia, Pennsylvania, was a voluntary unincorporated association.
2. That said association ceased to function in about February, 1922, and was formally dissolved June 9, 1922.
3. That none of the matters, things, practices, and activities alleged in the complaint and found as facts in the opinion of the commission of February 16, 1924, have been practiced or carried on or in any way engaged in since February, 1922.
4. That there is no association, agreement, or understanding between the wholesale tobacco dealers and jobbers of Philadelphia covering or in any way relating to the matters and things in the complaint in the above case alleged.

(Signed)

NELSON F. EBERRACH,

"

JOHN S. EBERRACH,

"

JOSEPH H. EBERRACH,

Partners, doing business under the name
and style of A. B. Cunningham & Co.

1368

(Received Feb. 29, 1924.)

[Title omitted.]

H. Stewart Moorhead, _____, doing business under the name and style of Duncan & Moorhead & Co., hereby states in response to the order of the Federal Trade Commission dated February 16, 1924, as follows:

1. That Wholesale Tobacco & Cigar Dealers' Association of Philadelphia, Pennsylvania, was a voluntary unincorporated association.

2. That said association ceased to function in about February, 1922, and was formally dissolved June 9, 1922.

3. That none of the matters, things, practices, and activities alleged in the complaint and found as facts in the opinion of 1369 the commission of February 16, 1924, have been practiced or carried on or in any way engaged in since February, 1922.

4. That there is no association, agreement, or understanding between the wholesale tobacco dealers and jobbers of Philadelphia covering or in any way relating to the matters and things in the above case alleged.

(Signed) H. STEWART MOORHEAD,
*Partners, doing business under the name
and style of Duncan & Moorhead.*

1370

(Received Mar. 1, 1924.)

[Title omitted.]

Anna E. Bechtold, an individual doing business under the trade name James S. Bechtold, hereby states in response to the order of the Federal Trade Commission dated February 16, 1924, as follows:

1. That Wholesale Tobacco & Cigar Dealers' Association of Philadelphia, Pennsylvania, was a voluntary unincorporated association.

2. That said association ceased to function in about February, 1922, and was formally dissolved June 9, 1922.

3. That none of the matters, things, practices, and activities alleged in the complaint and found as facts in the opinion of 1371 of the commission of February 16, 1924, have been practiced or carried on or in any way engaged in since February, 1922.

4. That there is no association, agreement, or understanding between the wholesale tobacco dealers and jobbers of Philadelphia covering or in any way relating to the matters and things in the above case alleged.

(Signed) ANNA E. BECHTOLD,
*Individual, doing business under the
trade name James S. Bechtold.*

1372

(Received Mar. 1, 1924.)

[Title omitted.]

M. J. Dalton Company, a corporation, hereby state in response to the order of the Federal Trade Commission dated February 16, 1924, as follows:

1. That Wholesale Tobacco & Cigar Dealers' Association of Philadelphia, Pennsylvania, was a voluntary unincorporated association.

2. That said association ceased to function in about February, 1922, and was formally dissolved June 9, 1922.

3. That none of the matters, things, practices, and activities alleged in the complaint and found as facts in the opinion of the commission of February 16, 1924, have been practiced or carried on or in any way engaged in since February, 1922.

4. That there is no association, agreement, or understanding between the wholesale tobacco dealers and jobbers of Philadelphia covering or in any way relating to the matters and things in the complaint in the above case alleged.

(Signed)

M. J. DALTON Co.

W. R. TAYLOR, V. P.

(Received Mar. 1, 1924.)

F. HARTMANN & SON,
CIGAR MANUFACTURERS,
THIRD AND ARCH STREETS,
Camden, N. J., February 28th, 1924.

[Title omitted.]

F. Hartmann, sr., president; Wm. K. Hartmann, vice president, and Joseph S. Hartmann, secretary and treasurer, doing business as and under the name of F. Hartmann & Son, Inc., hereby state in response to the order of the Federal Trade Commission, dated February 16th, 1924, as follows:

1. That Wholesale Tobacco & Cigar Dealers' Association of Philadelphia, Pennsylvania, was a voluntary unincorporated association.

2. That said association ceased to function in about February, 1922, and was formally dissolved June 9, 1922.

3. That none of the matters, things, practices, and activities alleged in the complaint and found as facts in the opinion of the commission of February 16, 1924, have been practiced or carried on or in any way engaged in since February, 1922.

4. That there is no association, agreement, or understanding between the wholesale tobacco dealers and jobbers of Philadelphia covering or in any way relating to the matters and things in the complaint in the above case alleged.

(Signed)

F. HARTMANN AND SON, INC.,

JOSEPH S. HARTMANN,

Secy. & Treas.,

Doing business under the name of

F. Hartmann & Son, Inc.

(Received Mar. 1, 1924.)

[Title omitted.]

Theodore H. Hart and Irving A. Mitchell, partners, doing business under the name and style of T. H. Hart & Co., hereby state in response to the order of the Federal Trade Commission dated February 16, 1924, as follows:

1. That Wholesale Tobacco & Cigar Dealers' Association of Philadelphia, Pennsylvania, was a voluntary unincorporated association.

2. That said association ceased to function in about February, 1922, and was formally dissolved June 9, 1922.

3. That none of the matters, things, practices, and activities alleged in the complaint and found as facts in the opinion of the commission of February 16, 1924, have been practiced or carried on or in any way engaged in since February, 1922.

4. That there is no association, agreement, or understanding between the wholesale tobacco dealers and jobbers of Philadelphia covering or in any way relating to the matters and things in the complaint in the above case alleged.

(Signed) THEODORE H. HART,
" IRVING A. MITCHELL,
*Partners, doing business under the name
and style of T. H. Hart & Co.*

PHILADA., Feb'y. 22nd, 1924.

1378

(Received Mar. 4, 1924.)

[Title omitted.]

Edward Cohen and William Cohen, partners, doing business under the name and style of E. Cohen & Son, hereby state in response to the order of the Federal Trade Commission dated February 16, 1924, as follows:

1. That Wholesale Tobacco & Cigar Dealers' Association, of Philadelphia, Pennsylvania, was a voluntary unincorporated association.

2. That said association ceased to function in about February, 1922, and was formerly dissolved June 9, 1922.

3. That none of the matters, things, practices, and activities alleged in the complaint and found as facts in the opinion of the commission of February 16, 1924, have been practiced or carried on or in any way engaged in since February, 1922.

4. That there is no association, agreement, or understanding between the wholesale tobacco dealers and jobbers of Philadelphia covering or in any way relating to the matters and things in the complaint in the above case alleged.

(Signed) EDWARD COHEN,
(deceased Oct., 1923)
" WILLIAM COHEN,
*Partners, doing business under the name
and style of E. Cohen & Son.*

1380

(Received Mar. 6, 1924.)

Fred G. H. Woerner & Sons

Wholesale dealers in confectionary, tobacco, cigars, pipes, and matches, 1415 Manayunk Ave., Roxborough, Philada.

MANAYUNK, PHILA., March 4, 1924.

[Title omitted.]

Fred G. H. Woerner, trading and doing business under the name and style of Fred G. H. Woerner & Sons, hereby state in response

to the order of the Federal Trade Commission dated Feb. 16th, 1924, as follows:

1. That Wholesale Tobacco & Cigar Dealers' Association of Philadelphia, Penna., was a voluntary unincorporated association.
- 1381 2. That said association ceased to function in about February, 1922, and was formally dissolved June 9, 1922.
3. That none of the matters, things, practices, and activities alleged in the complaint and found as facts in the opinion of the commission of February 16, 1924, have been practiced or carried on or in any way engaged in since February, 1922.
4. That there is no association, agreement, or understanding between the wholesale tobacco dealers and jobbers of Philadelphia covering or in any way relating to the matters and things in the complaint in the above case alleged.

(Signed) FRED G. H. WOERNER,
*Trading and doing business under name and
 style of Fred G. H. Woerner & Sons.*

1382 (Received Mar. 6, 1924)
 Shipton & Payne Company
 Wholesale distributors of cigars, tobacco, pipes and smokers' supplies,
 2854 North Fifth Street and 2859-61 North Reese Street

PHILADELPHIA, March 4, 1924.

[Title omitted.]

Arthur Shipton & Thomas S. Cooper partners, doing business under the name and style of Shipton & Payne Co., hereby state in response to this order of the Federal Trade Commission dated February 16, 1924, as follows:

1. That Wholesale Tobacco & Cigar Dealers' Association of Philadelphia, Pennsylvania, was a voluntary unincorporated association.
- 1383 2. That said association ceased to function in about February, 1922, and was formally dissolved June 9, 1922.
3. That none of the matters, things, practices, and activities alleged in the complaint and found as facts in the opinion of the commission of February 16, 1924, have been practiced or carried on or in any way engaged in since February, 1922.
4. That there is no association, agreement, or understanding between the wholesale tobacco dealers and jobbers of Philadelphia covering or in any way relating to the matters and things in the complaint in the above case alleged.

(Arthur Shipton died August 9th, 1922.)

(Signed) THOMAS S. COOPER,
*Partners, doing business under the name
 and style of Shipton & Payne Company.*

1384

(Received Mar. 12, 1924.)

F. Blatt

Manufacturer of La Caspa cigars
Jobbers of cigars, pipes, and tobaccos

41st Street and Lancaster Avenue

WEST PHILADELPHIA, PA., -----, 192

[Title omitted.]

Frank Blatt, doing business under the name and style of F. Blatt, hereby state in response to the order of the Federal Trade Commission, dated February 16, 1924, as follows:

1. That Wholesale Tobacco & Cigar Dealers' Association of Philadelphia, Pennsylvania, was a voluntary unincorporated association.

1385 2. That said association ceased to function in about February, 1922, and was formally dissolved June 9, 1922.

3. That none of the matters, things, practices, and activities alleged in the complaint and found as facts in the opinion of the commission of February 16, 1924, have been practiced or carried on or in any way engaged in since February, 1922.

4. That there is no association, agreement, or understanding between the wholesale tobacco dealers and jobbers of Philadelphia covering or in any way relating to the matters and things in the complaint in the above case alleged.

(Signed) FRANK BLATT.

1386

(Received Mar. 12, 1924.)

[Title omitted.]

Frank Kuhn, jr., John F. Kuhn, George J. Kuhn, and Frank J. Kuhn, partners, doing business under the the name and style of F. Kuhn & Brothers, hereby state in response to the order of the Federal Trade Commission dated February 16, 1924, as follows:

1. That Wholesale Tobacco & Cigar Dealers' Association of Philadelphia, Pennsylvania, was a voluntary unincorporated association.

2. That said association ceased to function in about February, 1922, and was formally dissolved June 9, 1922.

3. That none of the matters, things, practices, and activities alleged in the complaint and found as facts in the opinion of the commission of February 16, 1924, have been practiced or carried on or in any way engaged in since February, 1922.

1387 4. That there is no association, agreement, or understanding between the wholesale tobacco dealers and jobbers of Philadelphia covering or in any way relating to the matters and things in the complaint in the above case alleged.

(Signed) FRANK KUHN, JR.,
" JOHN KUHN,
" FRANK J. KUHN,
" GEO. J. KUHN,

Partners, doing business under the name
and style of F. Kuhn & Brother.

(Received Mar. 12, 1924.)

YAHN & McDONNELL,

MANUFACTURERS AND IMPORTERS,

1311 Sansom Street, Philadelphia, March 10, 1924.

FEDERAL TRADE COMMISSION,

Washington, D. C.

Attention Otis B. Johnson, secretary.

Docket No. 886

GENTLEMEN: We acknowledge receipt of report of your commission with reference to the Wholesale Tobacco and Cigar Dealers' Association of Philadelphia, and we have noted its contents.

1388 This corporation was not a member of the Wholesale Tobacco and Cigar Dealers' Association, and you were so informed at the time action was started against the association with reference to the matter of price control, and whilst our name was on the list of this association nevertheless it was without our sanction at the time, and we had no interest in it whatsoever, nor had we ever paid any initiation fees or dues in it.

We are strictly cigar jobbers, handling very few cigarettes in our wholesale department, and we do not enter into any combinations for the control of prices, or discriminate in any way against our customers.

Yours very truly,

(Signed)

YAHN & McDONNELL,

Per GEO. JONES,

Vice President.

1389

(Received Mar. 14, 1924.)

P. HOCHMAN, TOBACCONIST,

3051 Frankford Avenue, Philadelphia, Mar. 13, 1924.

[Title omitted.]

Philip Hochman and Morris Hochman, partners, doing business under the name and style of P. Hochman, hereby state in response to the order of the Federal Trade Commission dated February 16, 1924, as follows:

1. That Wholesale Tobacco & Cigar Dealers' Association, of Philadelphia, Pennsylvania, was a voluntary unincorporated association.
2. That said association ceased to function in about February, 1922, and was formally dissolved June 9, 1922.
- 1390 3. That none of the matters, things, practices, and activities alleged in the complaint and found as facts in the opinion of the commission of February 16, 1924, have been practiced or carried on or in any way engaged in since February, 1922.

4. That there is no association, agreement, or understanding between the wholesale tobacco dealers and jobbers of Philadelphia covering or in any way relating to the matters and things in the complaint in the above case alleged.

(Signed) PHILIP HOCHMAN,
" MORRIS HOCHMAN,
*Partners, doing business under the
name and style of P. Hochman.*

1391

(Received Mar. 15, 1924)

[Title omitted.]

William F. Shepherd & John G. Shepherd, partners, doing business under the name and style of S. Shepherd's Sons, hereby state in response to the order of the Federal Trade Commission dated February 16th, 1924, as follows:

1. That Wholesale Tobacco & Cigar Dealers' Association of Philadelphia, Pennsylvania, was a voluntary unincorporated association.

2. That said association ceased to function in about February, 1922, and was formally dissolved June 9th, 1922.

3. That none of the matters, things, practices, and activities alleged in the complaint and found as facts in the opinion of the 1392 commission of February 16th, 1924, have been practiced or carried on or in any way engaged in since February, 1922.

4. That there is no association, agreement or understanding between the wholesale tobacco dealers and jobbers of Philadelphia covering or in any way relating to the matters and things in the complaint in the above case alleged.

(Signed) WM. F. SHEPHERD,
" JOHN G. SHEPHERD,
*Partners doing business under the name
& style of S. Shepherd's Sons.*

PHILADELPHIA, Pa., Mar. 12, 1924.

1393

(Received Mar. 18, 1924)

[Title omitted.]

Wholesale Tobacco & Cigar Dealers' Association of Philadelphia, Pennsylvania, hereby states in response to the order of the Federal Trade Commission dated February 16, 1924, as follows:

1. That Wholesale Tobacco & Cigar Dealers' Association of Philadelphia, Pennsylvania, was a voluntary unincorporated association.

2. That said association ceased to function in about February, 1922, and was formally dissolved June 9, 1922.

3. That none of the matters, things, practices, and activities alleged in the complaint and found as facts in the opinion of the commission of February 16, 1924, have been practiced or carried on or in any way engaged in since February, 1922.

1394 4. That there is no association, agreement, or understanding between the wholesale tobacco dealers and jobbers of Philadelphia covering or in any way relating to the matters and things in the complaint in the above case alleged.

WHOLESALE TOBACCO & CIGAR DEALERS'
ASSOCIATION OF PHILADELPHIA,

By its former officers:

(Signed)	NELSON F. EIERBACH, <i>President.</i>
"	HARVEY D. NARRIGAN, <i>Vice President.</i>
"	PAUL L. BROGAN, <i>Secretary.</i>
"	HERMAN J. KRULL, <i>Treasurer.</i>
	<i>Board of Directors</i>
"	WILLIAM COHEN.
"	PETER F. MURPHY CO.
"	BENNETT HOLLARD.
"	H. STEWARD MOORHEAD.
"	FRANK BLATT.
"	FRANK KUHN, Jr.
"	WM. F. SHEPHERD.
"	MORRIS HOCHMAN.
"	PHILIP GORDESKY.

1395

(Received Mar. 21, 1924.)

[Title omitted]

Brucker & Boghien, Incorporated, hereby respond to the order to cease and desist of the Federal Trade Commission, dated February 16, 1924:

1. That the Wholesale Tobacco & Cigar Dealers' Association of Philadelphia, Pennsylvania, was a voluntary, unincorporated association.

2. That said association ceased to function about February, 1922, and formally dissolved June 9, 1922.

3. That none of the matters, things, practices, and activities, alleged in the complaint, and found as facts in the opinion of the commission of February 16, 1924, have been practiced or carried on, or in any way engaged in, since February, 1922.

1396 4. That there is no association, agreement, or understanding between the wholesale tobacco dealers and jobbers of Philadelphia, Pennsylvania, covering or in any way relating to the matters and things in the complaint in the above case.

(Signed) LOUIS FINK, *Secy.*
BRUCKER & BOGHIEH, INCORPORATED.

(Seal.)

(Received Mar. 22, 1924.)

Bennett Hollard

Wholesale dealer in cigars, tobacco, cigarettes, pipes, and snuff
2036 South Street, Philadelphia

[Title omitted.]

Bennett Hollard, doing business under the name and style 1397 of Bennett Hollard, hereby states in response to the order of the Federal Trade Commission dated February 16, 1924, as follows:

1. That Wholesale Tobacco & Cigar Dealers' Association of Philadelphia, Pennsylvania, was a voluntary unincorporated association.

2. That said association ceased to function in about February, 1922, and was formally dissolved June 9, 1922.

3. That none of the matters, things, practices, and activities alleged in the complaint and found as facts in the opinion of the commission of February 16, 1924, have been practiced or carried on or in any way engaged in since February, 1922.

4. That there is no association, agreement, or understanding between the wholesale tobacco dealers and jobbers of Philadelphia covering or in any way relating to the matters and things in the complaint in the above case alleged.

(Signed)

BENNETT HOLLARD

MAR. 17, 1924.

1398

(Received Mar. 22, 1924.)

[Title omitted.]

Philip Gordesky and Sidney Gordesky, partners, doing business under the name and style of Franklin Tobacco Co., hereby state in response to the order of the Federal Trade Commission, dated February 16, 1924, as follows:

1. That Wholesale Tobacco & Cigar Dealers' Association of Philadelphia, Pennsylvania, was a voluntary unincorporated association.

2. That said association ceased to function in about February, 1922, and was formally dissolved June 9, 1922.

3. That none of the matters, things, practices, and activities alleged in the complaint and found as facts in the opinion of the 1399 commission of February 16, 1924, have been practiced or carried on or in any way engaged in since February, 1922.

4. That there is no association, agreement, or understanding between the wholesale tobacco dealers and jobbers of Philadelphia covering or in any way relating to the matters and things in the complaint in the above case alleged.

(Signed)

P. GORDESKY,

"

SIDNEY GORDESKY,

Partners, doing business under the name
and style of Franklin Tobacco Co.

1400

(Received Apr. 1, 1924.)

Chas. A. Krull
55 North Second Street, Philadelphia

[Title omitted.]

Chas. A. Krull and Herman J. Krull, partners doing business under the name and style of Chas. A. Krull, hereby state in response to the order of the Federal Trade Commission, dated Feb. 16, 1924, as follows:

1. That Wholesale Tobacco & Cigar Dealers' Association of Philadelphia, Pennsylvania, was a voluntary unincorporated association.
2. That said association ceased to function in about February 22, 1922, and was formally dissolved June 9th, 1922.
- 1401 3. That none of the matters, things, practices, and activities alleged in the complaint and found as facts in the opinion of the commission of February 16, 1924, have been practiced or carried on or in any way engaged in since February, 1922.
4. That there is no association, agreement, or understanding between the wholesale tobacco dealers and jobbers of Philadelphia covering or in any way relating to the matters and things in the complaint in the above case alleged.

(Signed)

CHAS. A. KRULL,

"

HERMAN J. KRULL,

*Partners doing business under style
and name of Chas. A. Krull.*

1402

(Received Apr. 17, 1924.)

[Title omitted.]

Harvey D. Narrigan, vice president of Wholesale Tobacco and Cigar Dealers' Association, hereby state in response to the order of the Federal Trade Commission dated February 16, 1924, as follows:

1. That Wholesale Tobacco & Cigar Dealers' Association of Philadelphia, Pennsylvania, was a voluntary unincorporated association.
2. That said association ceased to function in about February, 1922, and was formally dissolved June 9, 1922.
3. That none of the matters, things, practices, and activities alleged in the complaint and found as facts in the opinion of the commission of February 16, 1922, have been practised or carried on or in any way engaged in since February, 1922.
- 1403 4. That there is no association, agreement, or understanding between the wholesale tobacco dealers and jobbers of Philadelphia covering or in any way relating to the matters and things in the complaint in the above case alleged.

(Signed)

HARVEY D. NARRIGAN,
*Vice President of Wholesale
Tobacco & Cigar Dealers' Assn.*

(Received Apr. 17, 1924)

[Title omitted.]

Harvey D. Narrigan, doing business under the name and style of Harvey D. Narrigan & Co., hereby state in response to the order of the Federal Trade Commission dated February 16, 1924, as follows:

1404 1. That Wholesale Tobacco & Cigar Dealers' Association of Philadelphia, Pennsylvania, was a voluntary unincorporated association.

2. That said association ceased to function in about February, 1922, and was formally dissolved June 9, 1922.

3. That none of the matters, things, practices, and activities alleged in the complaint and found as facts in the opinion of the commission of February 16, 1922, have been practiced or carried on or in any way engaged in since February 16, 1922.

4. That there is no association, agreement, or understanding between the wholesale tobacco dealers and jobbers of Philadelphia covering or in any way relating to the matters and things in the complaint in the above case alleged.

(Signed) HARVEY D. NARRIGAN,
Doing business under the name and
style of Harvey D. Narrigan & Co.

1405

(Received Apr. 17, 1924)

[Title omitted.]

John Murphy and Peter J. Murphy, partners, doing business under the name and style of Peter F. Murphy Co., hereby state in response to the order of the Federal Trade Commission dated February 16, 1924, as follows:

1. That Wholesale Tobacco & Cigar Dealers' Association of Philadelphia, Pennsylvania, was a voluntary unincorporated association.

2. That said association ceased to function in about February, 1922, and was formally dissolved June 9, 1922.

3. That none of the matters, things, practices, and activities alleged in the complaint and found as facts in the opinion of the commission of February 16, 1924, have been practiced or carried on or in any way engaged in since February, 1922.

4. That there is no association, agreement, or understanding between the wholesale tobacco dealers and jobbers of Philadelphia covering or in any way relating to the matters and things in the complaint in the above case alleged.

(Signed) JOHN MURPHY,
" PETER J. MURPHY,
Doing business under the name and
style of Peter F. Murphy Co.

United States Circuit Court of Appeals for the Second Circuit

THE AMERICAN TOBACCO COMPANY, PETITIONER
against

FEDERAL TRADE COMMISSION, RESPONDENT

Petition for review, and to set aside, an order of the Federal Trade Commission

To the Honorable Judges of the United States Circuit Court of Appeals for the Second Circuit:

Your petitioner, The American Tobacco Company, respectively represents:

First: That at all the times hereinafter mentioned, the petitioner was, and now is, a corporation organized and existing under and by virtue of the laws of the State of New Jersey, with its principal office in Jersey City in said state, and that it is now, and at all times hereinafter mentioned has been, carrying on business within said Second Circuit, with executive offices in the city, county, and State of New York, in the manufacture and sale of cigarettes and tobacco products.

Second: That heretofore and on the 29th day of May, 1922, the Federal Trade Commission purporting and claiming to act under the provisions of an act of Congress, approved September 26, 1914, known as the Federal Trade Commission act (38 Stat. 717, C. 311; U. S. Comp. St. 1916, sec. 8636e) issued and served upon this petitioner and other corporations, partnerships and persons, its complaint against petitioner and such other corporations, partnerships, and persons named in said complaint, charging this petitioner and such other corporations, partnerships, and persons with violation of section 5 of said Federal Trade Commission act. A copy of said complaint is hereto annexed, marked "Exhibit A" and made a part of this petition.

Third: That thereafter and on or about the 29th day of June, 1922, this petitioner, in accordance with the rule of said commission, made and filed with said commission its answer to said complaint, a copy of which is hereto annexed, marked "Exhibit B" and made a part of this petition.

Fourth: That thereafter and before any testimony was taken in said proceedings, this petitioner, as respondent in said proceedings, then pending before the Federal Trade Commission, made a motion to dismiss said proceedings on the ground that said complaint failed to charge this petitioner with any violation of said Federal Trade Commission act, and because said complaint was indefinite and uncertain, and said commission failed, neglected and refused to act upon the said motion.

Fifth: That thereafter the said proceedings were referred to George McCorkle, an examiner of said commission, for the taking of testimony in said proceedings, and testimony was thereupon adduced and evidence received before said examiner, as

will more fully appear from a transcript of the entire record in these proceedings, to be hereafter filed herein by said commission.

Sixth: That thereafter the said examiner, George McCorkle, made his report as such examiner, with tentative findings of fact in said proceedings, and tentative conclusions of law thereon, a copy of which report is hereto annexed, marked "Exhibit C" and made a part of this petition.

Seventh: That thereafter this petitioner filed with said commission its exceptions to said report of the said examiner, and to his tentative findings of fact therein, and that a copy of said exceptions is hereto annexed, marked "Exhibit D," and made a part of this petition.

Eighth: That thereafter and on the 10th day of October, 1923, the said proceedings were heard by the said commission upon the pleadings, testimony, report of the examiner, and exceptions thereto, and oral argument made by counsel for the commission and by counsel for all the respondents in said proceedings.

Ninth: That thereafter and on the 16th day of February, 1924, the said commission made in writing and filed certain findings as to the facts in said proceedings, and its conclusion that the practices of this petitioner under the conditions and circumstances described in said findings are unfair methods of competition in interstate commerce, and constitute a violation of the act of Congress approved September 26, 1914, entitled "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," and contemporaneously therewith made and filed an order whereby it is directed that the petitioner herein "cease and desist from assisting and from agreeing to assist any of its dealer-customers in maintaining and enforcing in the re-sale of cigarettes and other tobacco products manufactured by the said The American Tobacco Company, resale prices for such cigarettes and other tobacco products, fixed by any such dealer-customer by agreement, understanding, or combination with any other dealer-customer of said The American Tobacco Company."

In and by said order the petitioner herein was further ordered to file with the Federal Trade Commission within sixty days from the date of the service upon it of said order, a report in writing stating the manner and form in which said order had been conformed to. Contemporaneously with said findings as to the facts and order to cease and desist, the said commission filed and issued a dissenting opinion by Commissioner V. W. Van Fleet.

Tenth: That said findings as to the facts and said conclusion, and said order to cease and desist, and said dissenting opinion, were served on this petitioner on the 18th day of February, 1924. That a copy of said findings as to the facts and conclusion of said commission is hereto annexed, marked "Exhibit E" and made a part of this petition. That a copy of said order to cease and desist is hereto annexed, marked "Exhibit F" and made a part of this petition. That a copy of said dissenting opinion is

hereto annexed, marked "Exhibit G" and made a part of this petition.

Eleventh: That the said order to cease and desist is erroneous in fact and not sufficient in law, and ought to be reviewed by this honorable court and set aside for the following reasons:

(1) That said complaint does not set forth facts sufficient to constitute a violation of section 5 of said Federal Trade Commission act, or of any act which said commission is authorized by law to enforce, and said complaint is not sufficient in law upon the face thereof, and is indefinite and uncertain, and fails to state or charge any facts showing or constituting an illegal practice within the meaning of said act.

(2) The findings of said commission as to the facts do not sustain the conclusion of said commission, and are insufficient as a matter of law to support said order to cease and desist.

(3) That said commission has failed and refused to pass upon all the questions of fact involved in the issues raised by the complaint and answer in said proceedings; and it has failed and refused to find facts which were clearly established by the evidence, and which clearly showed that the practice complained of by the commission against this petitioner does not constitute an unfair method of competition.

(4) The following portions of the findings as to the facts are unsupported by evidence or testimony:

(1) So much of paragraph "Two" of the findings as to the facts set forth as follows:

"(e) Sought and secured the co-operation of the American Tobacco Company in such persuasion and intimidation, which said American Tobacco Company rendered by notifying its trade in the territory of the members, by circular letters and otherwise that the notifier would refuse to furnish further supplies of its products to any wholesale dealer who failed to re-sell such products at the prices fixed in the aforesaid letter, or implying the same in veiled language;

(f) Caused reports of the names of said dealers who failed to maintain said re-sale prices to be reported by the members and their salesman, either directly to the association, or through the respective members in each instance to the association, and upon receiving such reports, in turn, reported the names of such offending dealers to the American Tobacco Company, requesting its assistance in the enforcement of said system by having said American Tobacco Company refuse to further supply said offending dealers with any of its products;

(g) As a result of reporting said names to the American Tobacco Company and requesting its co-operation as set out in specification (f) hereof, secured the cooperation and assistance of the American Tobacco Company in that behalf and said American Tobacco Company, upon receiving such information, proceeded to investigate said instances of price-cutting and upon finding that the offending dealer was cutting prices and refusing

and failing to maintain the said re-sale prices, refused to furnish said offending dealer with further supplies of its products;

(h) Employed a special agent to spy upon the members and other dealers in the aforesaid territory in order to ascertain if any of them were failing to maintain said re-sale prices, and upon discovering that a member or dealer was so doing, to report the name of such offender to the association, which, upon receiving such reports, sought and secured the co-operation of the American Tobacco Company with regard to such offenders in like manner and with like results as set out in specifications (f) and (g)."

(2) The whole of "paragraph three" as follows:

"Paragraph three: During the period aforesaid in which the association adopted and maintained uniform re-sale prices for said American Tobacco Company's products in the manner and by the means set out in paragraph two hereof, it was the general policy of said American Tobacco Company to assist groups of its jobbers who would fix or who had fixed by co-operation among themselves uniform re-sale prices on its products, by refusing shipments of its goods to such of its jobbers who had re-sold or who would re-sell at prices lower than those fixed by such jobbers by co-operation among one another. Such was the policy of said American Tobacco Company with respect to respondent association and its members. The representatives of said American Tobacco Company in the territory in which the members re-sold its products were instructed by their superiors to carry out such policy in Philadelphia and vicinity and because of such instructions such representatives carried out such policy.

Said American Tobacco Company knew of the price agreement made by the association and its members as described in paragraph two hereof and agreed with the said association and its members to help them maintain the price agreements described in paragraph two hereof.

Charles Seider, one of said American Tobacco Company's distributors in Philadelphia and a competitor of the members, having declined an invitation of the president and treasurer of the respondent association to join its membership, was urged by the division manager of the American Tobacco Company in charge of its Philadelphia territory, to join the association. Said division manager requested said Seider to join the association and not to sell at prices below those fixed by it and its members, but to comply with the uniform prices put into effect by the members and by the association as described in paragraph two hereof. Said Seider refused to join the association, or to abide by its prices, and the said American Tobacco Company, after investigating a complaint made to it by the association and its members that the said Seider was re-selling its products at prices less than those fixed by the association and its members, discontinued selling to said Seider in the period

from April 20, 1921, to August 13, 1921, for the purpose of assisting the association and its members to maintain the price agreements as described in paragraph two hereof. After said Seider, following the suggestion made to him by the said division manager that if he joined respondent association, it would help him to get the shipments that had been withheld from him by said American Tobacco Company, applied to the vice-president of the respondent association for membership thereof, the said American Tobacco Company reinstated him as one of its customers and forwarded to him shipments that had been withheld in the period from April 20, 1921, to August 13, 1921.

Respondents John Murphy and James Murphy, partners doing business under the name and style Murphy Brothers, were expelled from the association in April, 1921, because they were accused by said association of reselling at prices less than those fixed by the 10 association. The American Tobacco Company, after investigating complaints made to it by the association that said Murphy Brothers were re-selling its products at prices less than those fixed by the association and its members, discontinued selling said Murphy Brothers in the period from August 29, 1921, to October 4, 1921, for the purpose of assisting the association and its members in maintaining the prices which had been fixed as set out in paragraph two hereof.

For the purpose of assisting the association and its members in maintaining the prices fixed by them as set out in paragraph two hereof, the American Tobacco Company in 1921, because of complaints made to it by the association and its members that respondents Fermani and Blumenthal were re-selling its products at prices less than those fixed by the association and its members, withheld shipments of its products to said Fermani and Blumenthal while it was investigating the prices at which Fermani and Blumenthal were re-selling its products."

Twelfth: The matters set forth in "paragraph four" of the commission's findings as to the facts are in reality conclusions of law, and not findings of fact, and are unsupported by evidence or by any finding of the commission.

Thirteenth: That said portions of said findings as to the facts above referred to in paragraph "eleventh" herein are not supported by the testimony and evidence in said proceedings, and 11 that facts important to the determination of the issues involved, and conclusively established by the testimony and evidence have been omitted therefrom.

Fourteenth: That said conclusions, those set forth in "paragraph four" of "Exhibit E" hereto, and that set forth in that part of said "Exhibit E" headed "Conclusion," are erroneous, and are not supported by said findings as to the facts, or said testimony and evidence.

Wherefore, no order to cease and desist should have been made in these proceedings, and said complaint ought to have been dismissed, and your petitioner prays that said commission be required to certify

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and file in this court a transcript of the record of the proceedings before it; and that upon the filing of such transcript, this court shall proceed forthwith as provided by law and review such order and set aside the same.

Dated, March 6th, 1924.

THE AMERICAN TOBACCO COMPANY,
Petitioner.

By GEORGE W. HILL, *Vice-President.*

JOHN WALSH,
JUNIOUS PARKER,
JONATHAN H. HOLMES,
Attorneys for Petitioner.

12 STATE OF NEW YORK,
County of New York, ss.:

George W. Hill, being duly sworn, deposes and says: That he is an officer, to wit, vice president of the American Tobacco Company, the petitioner named in the foregoing petition; that he has read the foregoing petition and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

GEORGE W. HILL.

Sworn to before me this 6th day of March, 1924.

[SEAL.]

J. R. CUMMINGS,
Notary Public, New York County No. 260.
New York Register No. 4066.

My Commission expires March 30, 1924.

13 *Exhibit A—Complaint*

United States of America before Federal Trade Commission
Docket No. 886

In the matter of Wholesale Tobacco and Cigar Dealers Association of Philadelphia, Pennsylvania, its officers, directors and members; Nelson F. Eberbach, its president; Harvey D. Narrigan and James Murphy, its vice-presidents; Herman J. Krull, its treasurer; Paul L. Brogan, its secretary, and their successors; Arthur Ship-ton, Frank Kuhn, William Cohen, Bennet Hollard, Frank Blatt, H. Stewart Moorhead, Philip Godeski, William D. Shepherd and Morris Hochman, and their successors, directors of said association and together constituting its board of directors; Nelson F. Eberbach, John S. Eberbach and Joseph H. Eberbach, partners doing business under the name and style of A. B. Cunningham & Company; Dusel, Goodloe & Company, Incorporated, a corporation; Philip Godeski and Sidney G. Godeski, partners doing business under the name and style Franklin Tobacco Com-

pany; Frank Kuhn, George Kuhn and John Kuhn, partners doing business under the name and style of F. Kuhn & Brothers; Peter J. Murphy and John Murphy, partners doing business under the name and style Peter F. Murphy Company; Charles A. Krull and Herman Krull, partners doing business under the name and style Charles A. Krull; Baum & Neely, Incorporated, a corporation; William F. Shepherd, and John G. Shepherd, partners doing business under the name and style S. Shepherd's Sons; 14 T. H. Hart and A. I. Mitchell, partners doing business under the name and style T. H. Hart & Company; F. Hartmann & Son, a corporation; Yahn & McDonn H Company, a corporation; M. Blumenthal; John Wagner and Joseph W. Wagner, partners doing business under the name and style of John Wagner & Sons; Harvey D. Narrigan, an individual doing business under the trade name H. D. Narrigan & Company; Victor Fermari; Anna E. Bechtold, an individual doing business under the trade name James S. Bechtold; Frank Blatt; Arthur Shipton and Thomas F. Cooper, partners doing business under the name and style Shipton & Payne Company; H. S. Moorhead, an individual doing business under the trade name Duncan & Moorhead; Bennett Hollard; P. Hochman; M. J. Dalton Company, a corporation; Brucker & Boghien, Incorporated, a corporation; Fred G. H. Woerner, an individual doing business under the trade name Fred G. H. Woerner & Sons; S. T. Banham and A. L. Banham, partners doing business under the name and style S. T. Banham & Brothers; E. Cohen and William Cohen, partners doing business under the name and style of E. Cohen & Sons; John Murphy and James Murphy, partners doing business under the name and style Murphy Brothers; American Tobacco Company, a corporation; P. Lorillard Company, a corporation.

COMPLAINT

Acting in the public interest pursuant to the provisions of an act of Congress, approved September 26, 1914, entitled, "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," the Federal Trade Commission charges that the Wholesale Tobacco and Cigar Dealers Association of Philadelphia, Pennsylvania, its officers, directors, members and the various individuals, partnerships and corporations named in the caption hereof, hereinafter referred to as respondents, have been and are using unfair methods of competition in interstate commerce in violation of the provisions of section 5 of said act, and states its charges in that respect as follows:

Paragraph one: Respondent, Wholesale Tobacco and Cigar Dealers Association of Philadelphia, Pennsylvania, is a voluntary unincorporated association organized in the year 1920 by and composed of various individuals, partnerships, and corporations engaged

in the business of selling at wholesale to wholesale and retail dealers cigars, cigarettes, and other tobacco products in the State of Pennsylvania and in neighboring States, in some instances doing a retail business in said commodities in addition to said wholesale business, said association is hereinafter called the association. Respondents, Nelson F. Everbach, Harvey D. Narrigan, James Murphy, Herman Krull and Paul L. Brogan were the original officers of the association, holding the respective official positions set out in the caption hereof. They and their successors have continuously been and are now such officers administering the affairs of the association. Arthur Shipton, Frank Kuhn, William Cohen, Bennett Hollard, Frank Blatt, H. Stewart Moorhead, Philip Godeski, William D. Shepherd and Morris Hochman were the original directors of the association and together constituted the original board of directors. They and their successors have continuously been and still are the directors and board of directors of the association, controlling and directing its affairs.

16

GROUP I.

The following named respondents with their several principal places of business in the city of Philadelphia, State of Pennsylvania, were at all times hereinafter mentioned and still are engaged in selling one or more of the aforesaid tobacco products at wholesale to wholesale and retail dealers in several States of the United States. They cause said products when so sold to be transported from their respective places of business in said city of Philadelphia to said purchasers at various points in various States of the United States:

Nelson F. Eberbach, John S. Eberbach and Joseph H. Eberbach, partners doing business under the name and style of A. B. Cunningham & Company;

Dusel, Goodloe & Company, Incorporated, a corporation organized under the laws of the State of New Jersey;

Philip Godeski and Sidney G. Godeski, partners doing business under the name and style Franklin Tobacco Company;

Peter J. Murphy and John Murphy, partners doing business under the name and style Peter F. Murphy Company;

Charles A. Krull and Herman Krull, partners doing business under the name and style Charles A. Krull;

William D. Shepherd and John G. Shepherd, partners doing business under the name and style of S. Shepherd's Sons;

17 T. H. Hart and A. L. Mitchell, partners doing business under the name and style T. H. Hart & Company;

Yahn & McDonnell Company, Incorporated, a corporation organized under the laws of the State of Pennsylvania;

M. Blumenthal;

John Wagner and Joseph W. Wagner, partners doing business under the name and style of John Wagner & Sons;

Harvey D. Narrigan, an individual doing business under the trade name of H. D. Narrigan & Company;

Victor Fermani;

Bennett Hollard;

P. Hochman;

M. J. Dalton Company, a corporation organized under the laws of the State of Pennsylvania;

Brucker & Boghien, Incorporated, a corporation organized under the laws of the State of Pennsylvania;

S. T. Banham and A. L. Banham, partners doing business under the name and style S. T. Banham & Brothers;

E. Cohen and William Cohen, partners doing business under the name and style E. Cohen & Sons.

GROUP II

The following named respondents with their several places of business in the city of Philadelphia, State of Pennsylvania, were at all times hereinafter mentioned and still are engaged in the business of selling one or more of aforesaid tobacco products at whole-
18 sale to wholesale and retail dealers wholly within the State of Pennsylvania:

Frank Kuhn, George Kuhn and John Kuhn, partners doing business under the name and style of F. Kuhn & Brothers;

Baum & Neely, Incorporated, a corporation organized under the laws of the State of Pennsylvania;

Anna E. Bechtold, an individual doing business under the trade name James S. Bechtold;

Frank Blatt;

Arthur Shipton and Thomas F. Cooper, partners doing business under the name and style Shipton & Payne Company;

H. S. Moorhead, an individual doing business under the trade name of Duncan & Moorhead;

Fred G. H. Woerner, an individual doing business under the trade name Fred G. H. Woerner & Sons;

GROUP III

The following named respondents with their several principal places of business in the city of Camden, State of New Jersey, were at all times hereinafter mentioned and still are engaged in selling one or more of aforesaid tobacco products at wholesale to wholesale and retail dealers in several States of the United States. They cause said products when sold to be transported from their several places of business in said city of Camden to said purchasers at points in various States of the United States:

F. Hartman & Son, a corporation organized under the laws of the State of New Jersey;

19 John Murphy and James Murphy, partners doing business under the name and style Murphy Brothers.

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All the foregoing respondents whose names are set out in Groups I, II, and III above were at all times hereinafter mentioned and still are members of the association and are hereinafter collectively referred to as the members. In the absence of the acts and things done by them as more particularly hereinafter set out, they were and are naturally and normally in unrestricted competition with each other and with other dealers in aforesaid territory.

Respondent, American Tobacco Company, is a corporation organized under the laws of the State of New Jersey, with its principal office in the city of Jersey City in said State and with factories in several of the United States. It was at all times hereinafter mentioned and still is engaged in the manufacture of cigars, cigarettes and other tobacco products and the sale thereof to wholesale and retail dealers throughout the United States. It causes its products when so sold to be transported from the point of manufacture to said purchasers at points in other States of the United States. Amongst said purchasers are all the respondents set out in Groups I, II, and III above.

Respondent, P. Lorillard Company, is a corporation organized under the laws of the State of New Jersey, with its principal office in the city of Jersey City, in said State and with factories in several of the United States. It was at all times hereinafter mentioned and still is engaged in the manufacture of cigars, cigarettes, and other tobacco products and the sale thereof to wholesale and retail dealers throughout the United States. It causes its products when so sold to be transported from the point of manufacture to said purchasers at points in other States of the United States. Amongst said purchasers are all the respondents set out in Groups I, II, and III above.

Said manufacturers at all times hereinafter mentioned were and still are in competition with each other and with other individuals, partnerships, and corporations similarly engaged in the manufacture and/or sale of tobacco products in interstate commerce except in so far as the same has been limited, prevented or suppressed by the acts and things done by them and the other respondents herein as more particularly hereinafter set out.

Paragraph two: At the time of the organization of the association, the prices at which said manufacturers sold their products were fixed as follows: Said manufacturers severally supplied the members with a schedule of prices denominated "list prices" which were the prices severally suggested by said manufacturers at which their products should be resold by the members to the retail trade. The prices at which said products were sold to the members were fixed by certain uniform discounts off said list in each instance, whereby the members paid to said manufacturers for said products said list prices minus said discounts. Wholesale and retail dealers in tobacco products throughout the United States, including respondent dealers set out in Groups I, II, and III above, then were and

still are dependent upon respondent manufacturers for their supply of a large portion of the products in which they deal. The extent of this dependence is such that when any such dealer is unable to secure the products of respondent manufacturers or either of them his business is substantially crippled, and he is placed at a competitive disadvantage with dealers supplied with said products. In the year 1920 the association and its members acting through the association and co-operating and conspiring with it, and with each other, agreed upon a schedule of fixed prices at which the members should thereafter resell to their dealer-customers the products dealt in by the members, including the products of respondent manufacturers, and having thus fixed said uniform resale prices, adopted a system for the maintenance and enforcement of said resale prices by the members and by all other wholesale-dealers in the trade who did business within the territory served by the members. Respondent manufacturers co-operated and conspired with the association and its members and participated in said price maintenance system as is more particularly hereinafter set out. In the course of aforesaid co-operative enforcement of said system, the members, and the association through its officers and directors, did, amongst others, and still do, the following acts and things:

(a) Undertook among themselves to maintain said resale prices, and did maintain same;

(b) Caused the fixation of said resale prices to appear as the formal action of the association by an appropriate resolution in that behalf;

(c) Caused the association to notify all members of said action;

(d) Sought by persuasion and intimidation to cause all dealers in the territory above referred to including those members of the association who discontinued the maintenance of said resale prices in violation of their aforesaid undertakings so to do, to maintain said resale prices;

(e) Sought and secured the co-operation of respondent manufacturers in such persuasion and intimidation, which each said manufacturer rendered by notifying the trade in aforesaid territory, by circular letters and otherwise, that the notifier would refuse to furnish further supplies of his products to any wholesale dealer who failed to resell such products at the prices fixed in aforesaid schedule, or implying the same in veiled language.

(f) Caused reports of the names of said dealers who failed to maintain said resale prices to be reported by the members and their salesmen, either directly to the association, or through the respective members in each instance to the association, and upon receiving such reports, in turn, reported the names of such offending dealers to respondent manufacturers requesting the assistance and cooperation of respondent manufacturers in the enforcement of said system by having said manufacturers refuse to further supply said offending dealers with any of their products.

(g) As a result of reporting said names to the respondent manufacturers and requesting their co-operation, as set out in specification (f) hereof, secured the cooperation and assistance of said manufacturers in that behalf and each said manufacturer upon receiving such information proceeded to investigate said instances of price cutting, and upon finding that the offending dealer was cutting prices, and refusing and failing to maintain aforesaid resale prices, refused to furnish said offending dealer with further supplies of its, the manufacturer's products, until the offender gave such promises and assurances of maintaining said resale prices in the future as were satisfactory to said manufacturers and the association in that regard:

(h) Employed special agents to spy upon the members and other dealers in the aforesaid territory in order to ascertain if any of them were or was failing to maintain said resale prices, and upon discovering that a member or a dealer was so doing, to report the name of such offender to the association. Upon receiving such reports, sought and secured the cooperation of the manufacturers with regard to said offenders in like manner and with like results as set out in specifications (f) and (g).

Paragraph three: The aforesaid acts and things done by respondents and each of them had and still have the tendency and capacity to constrain all wholesale dealers doing business in the territory above mentioned to uniformly sell the aforesaid products to their dealer-customers at the prices fixed by the association and its members as hereinbefore set out, and hence to hinder and suppress all competition in the wholesaling of said products in said territory, particularly among the members of the association and further to hinder and restrict competition between all retail dealers in said territory. Respondents' said practices thus tended and still tend to unduly hinder and obstruct the free and natural flow of commerce in the channels of interstate commerce.

Paragraph four: The above acts and things done by respondents and by each of them constitute unfair methods of competition in commerce, within the intent and meaning of section 5 of an act of Congress, entitled "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," approved September 26, 1914.

Wherefore, the premises considered, the Federal Trade Commission, on this 29th day of May, A. D. 1922, now here issues this its complaint against said respondents and each of them.

NOTICE

Notice is hereby given you, Wholesale Tobacco & Cigar Dealers Association of Philadelphia, Pennsylvania, and you, its officers, directors, and members named in the caption hereof, respondents herein that the 18th day of July, A. D. 1922, at 10.30 o'clock in the afternoon is hereby fixed as the time, and the officers of the Federal Trade

Commission, in the city of Washington, D. C., as the place, when and where a hearing will be had on the charges set forth in this complaint, at which time and place you shall have the right, under said act, to appear and show cause why an order should not be entered by said commission requiring you to cease and desist from the violation of the law charged in this complaint.

In witness whereof, the Federal Trade Commission has caused this complaint to be signed by its secretary, and its official seal to be hereto affixed at Washington, D. C., this 29th day of May, 1922.

By the commission:

[SEAL.]

J. P. YODER,
Secretary.

25 *Exhibit B—Answer of American Tobacco Company*

United States of America before the Federal Trade Commission

In the matter of Wholesale Tobacco and Cigar Dealers Association of Philadelphia, Pennsylvania, et als.

The American Tobacco Company, for its answer to the complaint herein to the effect that it has been and is using unfair methods in competition in interstate commerce, in violation of the provisions of the act of Congress approved September 26, 1914, entitled "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," alleges as follows:

Answering paragraph 1 of said complaint, this answering respondent,

1. Admits that it is a corporation organized under the laws of the State of New Jersey, that its principal office is in the city of Jersey City in said State, with factories in several of the United States; that it is now, and has been for many years last past, engaged in the manufacture of cigarettes and other tobacco products and the sale thereof to wholesale and retail dealers throughout the United States; that it causes its products when so sold to be transported

26 from the point of manufacture to purchasers at points in other States of the United States; and that it is now, and has

been for many years last past, in competition with the respondent, P. Lorillard Company and other individuals, partnerships, and corporations similarly engaged in the manufacture and/or sale of cigarettes and other tobacco products in interstate commerce, but denies that said competition is now, or has been, limited, prevented or suppressed by respondent as alleged in said complaint, or otherwise.

2. Further answering paragraph 1 of said complaint, this respondent alleges that it has no knowledge or information of the other matters therein alleged, and can, therefore, neither admit nor deny the same, and if they be material, demands strict proof thereof.

3. Further answering said complaint, this answering respondent alleges that, except as to those matters herein specifically admitted,

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and those matters of which it has no knowledge or information as herein alleged, it denies each and every allegation of said complaint.

Wherefore, it prays that the said complaint be dismissed.

AMERICAN TOBACCO COMPANY,
By PERCIVAL HILL, *President*.

JUNIUS PARKER,

JOHN WALSH,

Counsel for Respondent, American Tobacco Company.

27 *Exhibit C—Examiner's report upon the facts*

United States of America Before Federal Trade Commission

Docket No. 886

In the matter of Wholesale Tobacco and Cigar Dealers Association of Philadelphia, Pennsylvania, its officers, directors, and members; Nelson F. Eberbach, its president; Harvey D. Narrigan and James Murphy, its vice-presidents; Herman J. Krull, its treasurer; Paul L. Brogan, its secretary, and their successors; Arthur Shipton, Frank Kuhn, William Cohen, Bennett Hollard, Frank Blatt, H. Stewart Moorhead, Philip Godeski, William D. Shepherd and Morris Hochman, and their successors, directors, of said association and together constituting its board of directors; Nelson F. Eberbach, John S. Eberbach, and Joseph H. Eberbach, partners doing business under the name and style A. B. Cunningham & Company; Dusel, Goodloe & Company, Incorporated, a corporation; Philip Godeski and Sidney G. Godeski, partners doing business under the name and style Franklin Tobacco Company; Frank Kuhn, George Kuhn and John Kuhn, partners doing business under the name and style F. Kuhn & Brother; Peter J. Murphy and John Murphy, partners doing business under the name and style Peter F. Murphy Company; Charles A. Krull and Herman Krull, partners doing business under the name and style Charles A. Krull; Baum & Neely, Incorporated, a corporation; William F. Shepherd and John

28 G. Shepherd, partners doing business under the name and style S. Shepherd's Sons; T. H. Hart and A. I. Mitchell, partners doing business under the name and style T. H. Hart & Company; F. Hartmann & Son, a corporation; Yahn & McDonnell Company, a corporation; M. Blumenthal; John Wagner and Joseph W. Wagner, partners doing business under the name and style of John Wagner & Sons; Harvey D. Narrigan, an individual doing business under the trade name H. D. Narrigan & Company; Victor Fermani; Anna E. Bechtold, an individual doing business under the trade name James S. Bechtold; Frank Blatt; Arthur Shipton and Thomas F. Cooper, partners doing business under the name and style Shipton & Payne Company; H. S. Moorhead, an individual doing business under the trade name Duncan &

Moorhead; Bennett Hollard; P. Hochman; M. J. Dalton Company, a corporation; Brucker & Boghien, Incorporated, a corporation; Fred G. H. Woerner, an individual doing business under the trade name Fred G. H. Woerner & Sons; S. T. Banham and A. L. Banham, partners doing business under the name and style S. T. Banham & Brothers; E. Cohen and William Cohen, partners doing business under the name and style E. Cohen & Sons; John Murphy and James Murphy, partners doing business under the name and style Murphy Brothers; American Tobacco Company, a corporation; P. Lorillard Company, a corporation.

EXAMINER'S REPORT UPON THE FACTS

Pursuant to the provisions of an act of Congress approved September 26, 1914, the Federal Trade Commission issued and served its complaint upon the respondents, Wholesale Tobacco & Cigar Dealers Association of Philadelphia, Pennsylvania, its officers, directors, and members; Nelson F. Eberbach, its president; Harvey D. Narrigan and James Murphy, its vice-presidents; Herman J. Krull, its treasurer; Paul L. Brogan, its secretary, and their successors; Arthur Shipton, Frank Kuhn, William Cohen, Bennett Hollard, Frank Blatt, H. Stewart Moorhead, Philip Godeski, William D. Shepherd, and Morris Hochman, and their successors, directors of said association and together constituting its board of directors; Nelson F. Eberbach, John S. Eberbach, and Joseph H. Eberbach, partners doing business under the name and style A. B. Cunningham & Company; Dusel, Goodloe & Company, Incorporated, a corporation; Philip Godeski and Sidney G. Godeski, partners doing business under the name and style Franklin Tobacco Company; Frank Kuhn, George Kuhn and John Kuhn, partners doing business under the name and style F. Kuhn & Brother; Peter J. Murphy and John Murphy, partners doing business under the name and style Peter F. Murphy Company; Charles A. Krull, and Herman Krull, partners doing business under the name and style Charles A. Krull; Baum & Neely, Incorporated, a corporation; William F. Shepherd and John G. Shepherd, partners doing business under the name and style S. Shepherd's Sons; T. H. Hart and A. I. Mitchell, partners doing business under the name and style T. H. Hart & Company; F. Hartmann & Son, a corporation; Yahn & McDonnell Company, a corporation; M. Blumenthal; John Wagner and Joseph W. Wagner, partners doing business under the name and style of John Wagner & Sons; Harvey D. Narrigan, an individual doing business under the trade name H. D. Narrigan & Company; Victor Fermani; Anna E. Bechtold, an individual doing business under the trade name James S. Bechtold; Frank Blatt; Arthur Shipton and Thomas F. Cooper, partners doing business under the name and style Shipton & Payne Company; H. S. Moorhead, an individual doing business under the trade name Duncan & Moorhead; Bennett Hollard; P. Hochman; M. J. Dalton

Company, a corporation; Brucker & Boghien, Incorporated, a corporation; Fred G. H. Woerner, an individual doing business under the trade name Fred G. H. Woerner & Sons; S. T. Banham and A. L. Banham, partners doing business under the name and style S. T. Banham & Brothers; E. Cohen and William Cohen, partners doing business under the name and style E. Cohen & Sons; John Murphy and James Murphy, partners doing business under the name and style Murphy Brothers; American Tobacco Company, a corporation; P. Lorillard Company, a corporation, charging them with the use of unfair methods of competition in commerce in violation of the provisions of said act.

The respondents, Wholesale Tobacco & Cigar Dealers Association of Philadelphia, and its members; the American Tobacco Company and the P. Lorillard Company, having filed their answers and entered their appearances by their attorneys, Joseph H. Taulane, John Walsh, L. A. Spiess, Junius Parker, Charles Caldwell, respectively, M. J. Dalton Company, John Wagner & Sons, Yahn & McDonnell Company, Baum & Neely, Inc., and Murphy Brothers appearing in person, hearing was had before George McCorkle, an

examiner of the commission, theretofore duly appointed, and testimony introduced in support of the allegations of the complaint, and also in support of the defense by respondents, American Tobacco Company and P. Lorillard Company, and no testimony having been offered by the Wholesale Tobacco & Cigar Dealers Association of Philadelphia or by any of its members, in defense, the examiner now makes this report upon the facts:

Paragraph one: The Wholesale Tobacco & Cigar Dealers Association of Philadelphia (Pennsylvania) is a voluntary unincorporated association organized in the month of August, 1920, by and composed of various individuals, partnerships, and corporations engaged in the business of selling at wholesale to wholesale and retail dealers cigars, cigarettes, and other tobacco products in the State of Pennsylvania and neighboring States, in some instances, doing a retail business in the said commodities in addition to their said wholesale business. Respondents Nelson F. Eberbach, Harvey D. Narrigan, James Murphy, Herman Krull, and Paul L. Brogan were the original officers of the said tobacco association holding the respective official positions set out in the caption hereto. They and their successors have been continuously and are now such officers. Arthur Shipton, Frank Kuhn, William Cohen, Bennett Hollard, Frank Blatt, H. Stewart Moorhead, Philip Godeski, William D. Shepherd, and Morris Hochman were the original directors of the association and together constituted the board of directors. They and their successors have been continuously the directors and board of directors of the said association.

The following named respondents with their principal places of business in the city of Philadelphia, State of Pennsylvania, were at all times hereinafter mentioned and still an

engaged in selling one or more of the aforesaid tobacco products at wholesale to wholesale and retail dealers in the several States of the United States, causing the said products when so sold to be transported from their respective places of business in said city of Philadelphia to purchasers at various points throughout the United States:

Nelson F. Eberbach, John S. Eberbach, and Joseph H. Eberbach, partners doing business under the name and style of A. B. Cunningham & Company;

Dusel, Goodloe & Company, Incorporated, a corporation organized under the laws of the State of New Jersey;

Philip Godeski and Sidney G. Godeski, partners doing business under the name and style Franklin Tobacco Company;

Peter J. Murphy and John Murphy, partners doing business under the name and style Peter F. Murphy Company;

Charles A. Krull and Herman Krull, partners doing business under the name and style Charles A. Krull;

William D. Shepherd and John G. Shepherd, partners doing business under the name and style of S. Shepherd's Sons;

T. H. Hart and A. I. Mitchell, partners doing business under the name and style T. H. Hart & Company;

Yahn & McDonnell Company, Incorporated, a corporation organized under the laws of the State of Pennsylvania;

M. Blumenthal;

23 John Wagner and Joseph W. Wagner, partners doing business under the name and style of John Wagner & Sons;

Harvey D. Narrigan, an individual doing business under the trade name of H. D. Narrigan & Company;

Victor Fermani;

Bennett Hollard;

P. Hochman;

M. J. Dalton Company, a corporation organized under the laws of the State of Pennsylvania;

Brucker & Boghien, Incorporated, a corporation organized under the laws of the State of Pennsylvania;

S. T. Banham and A. L. Banham, partners doing business under the name and style of S. T. Banham & Brothers;

E. Cohen and William Cohen, partners doing business under the name and style E. Cohen & Sons.

The following named respondents with their several places of business in the city of Philadelphia, State of Pennsylvania, were at all times hereinafter mentioned and still are engaged in the business of selling one or more of the tobacco products aforesaid at wholesale to wholesale and retail dealers wholly within the State of Pennsylvania;

Frank Kuhn, George Kuhn and John Kuhn, partners doing business under the name and style of F. Kuhn & Brothers;

Baum & Neely, Incorporated, a corporation organized under the laws of the State of Pennsylvania;

34 Anna E. Bechtold, an individual doing business under the trade name James S. Bechtold;

Frank Blatt;

Arthur Shipton and Thomas F. Cooper, partners doing business under the name and style Shipton & Payne Company;

H. S. Moorhead, an individual doing business under the trade name of Duncan & Moorhead;

Fred G. H. Woerner, an individual doing business under the trade name of Fred G. H. Woerner & Sons.

The following named respondents with their several places of business in the city of Camden, State of New Jersey, were at all times hereinafter mentioned and still are engaged in selling one or more of aforesaid tobacco products at wholesale to wholesale and retail dealers in the several States of the United States, causing said products when sold to be transported from their several places of business in said city of Camden to purchasers in various States of the United States:

F. Hartmann & Son, a corporation organized under the laws of the State of New Jersey;

John Murphy and James Murphy, partners doing business under the name and style Murphy Brothers.

All of the foregoing respondents whose names are set out above were at all times hereinafter mentioned and still are members of the respondent Wholesale Tobacco & Cigar Dealers Association
35 of Philadelphia and except as to those acts and things done by them as is more particularly hereinafter set out, they were and are normally in unrestricted competition with each other and with other dealers in the aforesaid territory.

Respondent, American Tobacco Company, is a corporation organized under the laws of the State of New Jersey with its principal office in the city of Jersey City, in said State, and owns and operates tobacco factories in various States of the United States. The said company was at all times hereinafter mentioned and still is, engaged in the manufacture of cigars, cigarettes, and other tobacco products and the sale thereof to wholesale and retail dealers throughout the United States. It causes its said products when so sold to be transported from point of manufacture to purchasers at points in other cities of the United States. Amongst its said purchasers are all the respondents, members of the Wholesale Tobacco & Cigar Dealers Association of Philadelphia, as set out above.

Respondent, P. Lorillard Company, is a corporation organized under the laws of the State of New Jersey, with its principal place of business in the city of Jersey City, in said State, and with factories located in New York City, Marion, New Jersey; Wilmington, Delaware; Baltimore, Maryland; Richmond, Virginia; Louisville, Kentucky; Middletown, Ohio; and Lancaster, Pennsylvania. The said

company was at all times hereinafter mentioned and still is engaged in the manufacture of cigars, cigarettes, and other tobacco products and the sale thereof to wholesale and retail dealers throughout the United States, causing its products when so sold to be transported from point of manufacture to the said purchasers at various points in other States of the United States, and among its purchasers are all of the respondents, members of the said Wholesale Tobacco and Cigar Dealers Association of Philadelphia.

The said manufacturing companies at all times hereinafter mentioned were and still are in competition with each other and with other individuals, partnerships and corporations similarly engaged in the manufacture and sale of tobacco products in interstate commerce except in so far as competition may have been limited, or restricted by acts and things done by them and the other respondents herein.

Paragraph two: After a preliminary meeting of the Wholesale Tobacco and Cigar Dealers in Philadelphia in July, 1920, at the Hotel Adelphia, in said city, the respondent association was duly organized on August 5th, 1920, electing its several officials above-mentioned, and adopted a constitution and by-laws, appointing its several committees, its membership constituting all except one or two of the wholesale tobacco and cigar dealers in the city of Philadelphia, and two jobbing firms in Camden, New Jersey. The committees appointed by said association consisted of an executive committee, a finance committee, and an investigating committee. The duties of the first-named committee consisted in part recommending to the association the adoption of any action touching the maintenance of uniform prices at which its members should sell their respective tobacco products to all retailers and subjobbers in the said Philadelphia tobacco district. The finance committee attended to the finances of the association, and the investigating committee made investigation of all complaints made against any of the members of the said association for failing to stand by any resolution or agreement as to the maintenance of any price or prices that might be agreed upon by the association. Shortly after the organization of the association the said executive committee recommended to the association, and the same was adopted unanimously, the following resolution:

"Your committee reports that at a meeting of the board of directors held September 7th it was unanimously resolved that the cash discounts on tobacco and cigarettes be not more than 8 per cent. The committee was requested to notify all members not in attendance at this meeting."

Respondents, American Tobacco Company and the P. Lorillard Company, sell their products to jobbers at prices designated in certain price list schedules furnished all of said wholesale tobacco dealers, as do quite all of the other manufacturers of tobacco products, less what is termed a trade discount of ten per cent and a cash discount of two per cent if bills or invoices are paid within ten days.

The discount of eight per cent above mentioned as having been agreed upon by the members of the said association was a discount from the manufacturers' list prices. The said discount agreed upon by

the association continued in effect until June 8, 1921, when
38 the same was changed to seven per cent. The members of the said association were duly notified of the said change from the headquarters of the association at 112-14 North 7th St., Philadelphia, Pa., as follows:

"Effective June 20, 1921, the maximum trade discount will be seven per cent.

Paper cigarettes, when purchased in lots of 10,000, one brand or assorted, an extra allowance of seven and one-half cents per thousand Beech Nut cigarettes \$5.70 per thousand, net."

Raising the price to the retailer by the association from eight to seven per cent off the manufacturers' list caused the retailers and the subjobbers, now classed as retailers by the association, to use all the ingenuity and persuasion they could command to "break" the prices fixed by the association, in consequence of which it was difficult for the association to hold its members in line to the said agreed discounts and so-called price cutting began to spring up in the Philadelphia district, and the president of the association and its committee of investigation were busy hearing reports and investigating complaints against members for the offence of so-called price cutting. The president wrote to a tobacco jobber in Manayunk, Philadelphia, calling his attention to a report that he was engaged in price cutting and requested his cooperation with the Philadelphia
39 association, and when the said jobber continued in his price cutting methods he was again written to and admonished by the president of the association that if he continued to cut prices as he had done, he would be compelled to take the matter up with New York. The president of the association also stated to some complainants that he was unable to get any satisfaction from the so-called price cutter and that pressure from the above source (meaning the large manufacturers) would be the only method of handling them.

The president and treasurer of the said association visited a so-called price cutter, member of the association, residing in Camden, N. J., and admonished him to abide by the discounts fixed by the association. The said Camden price cutter was later dropped from the direct buying list of the respondent, the American Tobacco Company, as will hereinafter more particularly appear.

Paragraph three: Prior to the organization of the said respondent, Wholesale Tobacco & Cigar Dealers Association of Philadelphia, there were quite as many tobacco dealers in the Philadelphia district known as subjobbers as there were regular or so-called legitimate jobbers in said district. Subjobbers had been recognized by the large tobacco manufacturers as proper mediums of distribution of their products to retailers and others heretofore but by action of the association they were put upon the same plane and in the same

class as to the discounts allowed them as the retailers in said district received, regardless of the quantity of goods purchased. Some of the said subjobbers had many thousands of retail customers and not being able to purchase the said tobacco products from the respondent manufacturers, or from the regular jobbers at any discount other than what the smallest shoeshine parlor in the city could purchase the said products had the tendency to and did eliminate some of them from the field of competition.

At a meeting of the subjobbers called for the purpose of considering some action to relieve their financial distress a committee was appointed to confer with the president of the respondent association and request a more favorable discount, one that would permit them to hold their old retail customers. The said committee received no encouragement and no promise of relief from the president of the association. Their next step was to send a petition to the president of the American Tobacco Company, dated October 29, 1920, in which they made appeal to him as president of the American Tobacco Company to use his "influence to help correct a condition in this city that spells ruin for them (subjobbers) if it continues." The petition for this stated "During the present month any little grocery can buy merchandise at the same price in \$5 and \$10 orders as the subjobber who buys in thousands, and it seems to be the object of the direct jobbers to cater particularly to the trade that the subjobber calls upon" * * * "In days gone by the American Tobacco Company recognized the subjobber as a legitimate and necessary outlet in the process of distribution, and we feel they would not countenance an arrangement that would put them out of business." No attention was paid to this petition by the president of the American Tobacco Company, and no relief was in sight from any quarter.

Paragraph four: During the functioning of the said association, when prices increased rather than diminished, the pressure from subjobbers in the Philadelphia district for a reduction to the discount of the association as to them also increased.

The president of the Philadelphia Association and its treasurer made a trip to New York City to the general offices of the American Tobacco Company and to the offices of the respondent the Lorillard Company in said city. In their conversations with the officers of the respondent manufacturers, trade conditions in Philadelphia, including the movement to establish associations, were discussed; also possibly one or two so-called price cutters were talked about. Shortly before this visit of the president and treasurer of the association, or a short time thereafter, the American Tobacco Company issued its circular Number 2783, dated June 29, 1921, to its jobbing customers and sent the same broadcast throughout the country. Two paragraphs from it are as follows:

* * * * *

Any jobber who sells our products without profit or with such a small profit that it will not benefit him to continue permanently in

the tobacco jobbing business on such a margin of profit is not a distributor who can afford us a safe and permanent avenue of distribution, and, if by his persistent price cutting, he discourages and destroys the interest in our brands with competing jobbers, he may eventually be left without adequate means of thorough distribution in his locality.

For this reason we are convinced that for the future of our business we are bound to prevent as far as we reasonably and law-
 42 fully may such demoralization in the trade so far as our products are concerned. This does not mean price-maintenance, but it does mean that where a jobber is not interested in making a fair and reasonable profit on our brands and elects to sell our products for motives of his own, at less than a living profit, we are forced to the conclusion that he is not sufficiently interested in our goods to make a desirable permanent customer, and we shall feel at liberty to remove him from our list of direct customers.

Respondent, P. Lorillard Company, issued five circulars of the same import as the above to its customers in various States of the United States between the dates of May 25 and August 3, 1921, and one of the said circulars was sent to its customers where tobacco dealers' associations have been formed similar in many respects to the said respondent association, knowledge of which the Lorillard Company had possession at the time. One of its said circulars, Number 1369, was sent to its customers in the Philadelphia district and to other points in the United States, of which the following is a copy:

Circular No. 1369

NEW YORK, August 3, 1921.

To Our Customers:

Having received many inquiries from jobbers generally as to what the attitude of this company is in reference to the jobber
 43 receiving a legitimate profit for handling and distributing merchandise of this company's manufacture, we beg to quote herewith letter sent out on May 25, 1921, to many sections, which outlines our position, we think, quite clearly:

"MAY 25, 1921.

To Our Customers:

The 10% discount from our list price allowed all jobbers on our tobacco line is what we consider a fair and legitimate profit, accruing to the jobber for handling and distributing our goods.

Long business usage has confirmed the fairness of this arrangement.

Knowing that a reasonable profit is essential to the success of any business and that only successful jobbers are satisfactory and dependable distributors, we feel that it is good business for us to urge the jobber to sell our brands at prices that will not prove an injury

to our valuable trade-marks. Where the jobber persists in disregarding our policy in such matters, it is logical for us to conclude that he is willing to sacrifice our business welfare for his own selfish interest.

We believe you will agree with us that it would be a very short-sighted policy to continue to supply such firms with the means of demoralizing our accustomed channels of distribution.

All orders subject to acceptance by our New York office, and if accepted will be filled at prices ruling on day of shipment.

44 No representative or employee of this company has authority to change any circular, letter, or price list issued by this company.

Yours respectfully,

P. LORILLARD COMPANY,
Incorporated.

Since the issuance of this circular other manufacturers, we are pleased to see, have taken quite a similar action with a view to pointing out to the jobber the importance of bringing about a betterment of selling conditions existing in different sections of the country.

We now wish to advise that any move to better selling conditions in your section will, in so far as we can properly and lawfully assist, have our hearty support and approval.

Yours respectfully,

P. LORILLARD COMPANY,
Incorporated.

The avowed policy of the American Tobacco Company and the P. Lorillard Company was to uphold and support the prevailing prices fixed upon their products in any tobacco district by the tobacco jobbers therein. In a letter dated May 2, 1921, to a jobber in Minneapolis, Minn., requesting the cooperation of the American Tobacco Company and other manufacturing companies in preventing so-called price cutting, the vice president of the American Tobacco Company replied that it was not at all possible to get cooperation as a unit from the leading manufacturers; that "as
45 far as this company is concerned, as Mr. Hill wrote you, we are greatly interested in the matter and regret to see the tendency towards price cutting. We feel very definitely here that when jobbers have cooperated and have held such conferences as Mr. Hill has suggested (the Mr. Hill is the president of the American Tobacco Company) then the manufacturer can step in by refusing shipments or withhold orders from the demoralizers, and thereby assist those legitimate jobbers who desire to make a profit." On July 8, 1921, the general sales manager of the American Tobacco Company wrote to one of their agents "not to arrange any meetings for your jobbers. You should suggest to the jobbers that it is their duty to get together themselves." "We do not want to be a part of any organization whatever but we will insist upon the maintenance

of the price that I suggested to you as all jobbers with whom I come in contact advise me that this is the prevailing price in this community."

Paragraph five: The two respondent manufacturing companies manifested their interest in and cooperation with the Philadelphia Tobacco & Cigar Dealers Association and its members by cutting off from their direct list certain jobbers whose conduct for deviating from the prices fixed by the association, in the sale of the products of the said companies, was brought to their attention. After considerable correspondence between the sales manager of the American Tobacco Company in Philadelphia and the general officers of the American Tobacco Company in New York concerning the price cutting activities of a Camden, N. J., firm of jobbers, member of the Wholesale Tobacco & Cigar Dealers Association of Philadelphia,

46 on August 28, 1921, the said jobber was dropped from the direct buying list of the American Tobacco Company. The said firm sold its products at a discount of 10 per cent off list and instead of marking on its invoices the true discount of 10 per cent., falsely marked thereon eight and seven per cent., respectively, which were the discounts allowed by the association. The said firm on one occasion attended a meeting of the association after having heard reports that were circulating among members of the association to the effect that they had been "breaking the price combination." While there they accused other members of the association of doing the same thing and considerable disturbance of a physical nature was about to occur when the meeting broke up and the said firm withdrew from the association. However, after having made proper assurances that they would desist from its so-called price cutting, the firm was reinstated on the direct buying list by the American Tobacco Company on October, 4, 1921.

Paragraph six: In the latter part of the month of January, 1921, a representative of P. Lorillard Company in the Philadelphia district had a conversation with a jobber by the name of Seider and requested him to join the Philadelphia Tobacco Dealers Association—that it would be best for him. The jobber was then buying his goods from the American Tobacco Company and the P. Lorillard Company direct and had been for many years. The said jobber had also received an invitation to attend one of the meetings of the association and was also called upon by the president and treasurer of the association and requested to join the same. The president of the association also requested Seider's son to go along with 47 the association prices. A representative of the American Tobacco Company also stated to Seider that it would be better for him to join the association, that he might not get his goods if he made any more disturbance. Neither Seider nor his son, who is associated with him in business, joined the association and a month or two later his orders to the American Tobacco Company were cancelled and remained cancelled for the space of two months and

his orders to the Lorillard Company were cancelled and remained cancelled for the space of six months. The American Tobacco Company refused to ship Seider any of its products from April 30 to July 12, 1921. Repeated requests to the said companies to fill his orders brought no replies from either. The last shipment received from the Lorillard Company was April 5, 1921, and the interim lasted until November 1, 1921. In the meantime, this old customer of Lorillard's was pleading to have his orders filled when he received the following letter from the company:

MAY 2, 1921.

MR. GEORGE SEIDER,

*S. E. Corner 4th and Ray Sts.,
Philadelphia, Pa.*

DEAR SIR: Replying to your letter of April 30, we ask that you kindly place your orders for our products with jobbers convenient to you * * *.

Yours very truly,

SIDNEY KELLY,

Asst. Aud.

48 On May 6, the Lorillard Company wrote the same jobber that they were not inclined to make further shipments direct to him and suggested that he supply his "needs through jobbers convenient to him." October 14, 1921, the Lorillard Company in reply to a request of Seider to be placed on the said company's direct purchasing list, said the matter had "been submitted to its sales board for its careful consideration," and that as soon as their head salesman covering Philadelphia submitted their recommendations as to his request (and he would doubtless receive a visit from them in the near future), the company upon receiving their reports, would then be in a position to advise him definitely of their decision. Seider also went to see the vice president of the Lorillard Company in New York about getting reinstated. As above stated, the said jobber was reinstated on the direct buying list of the Lorillard Company November 1, 1921. This jobber firm had been a regular purchaser of the Lorillard Company from ten to twelve years. Their credit had never been questioned. Their bills had always been paid, and only after the formation of the Philadelphia Association and his failure to join the same and abide by or follow along with the prices so fixed by it did any trouble arise between the said Lorillard Company and its said long-time customer.

The Lorillard Company was also petitioned by the subjobbers for relief from the effects of the action of the association in placing the jobbers and the retailers in the same class as to the discounts allowed therein regardless of the amount of the purchases, 49 and the remedy the representative of the Lorillard Company suggested was that if the subjobber interviewing him would move out of the Philadelphia district beyond the jurisdiction of the Philadelphia Association, the Lorillard Company would then sell him at prices which he had been accustomed to receive prior to the formation of the Tobacco Dealers Association as aforesaid.

Paragraph seven: The general policy of the Lorillard Company was the same towards so-called price cutters in 1920 and 1921 and towards associations of tobacco dealers organized and functioning during the said years with activities similar to the respondent association regardless of State or locality. On May 20, 1921, the Lorillard Company wrote two reputed so-called price cutters in Cincinnati that "there seems to be a general movement throughout the country on the part of the jobbers and we have recently been advised it has extended to Cincinnati—to secure a fair margin of profit for handling tobacco products" and the said respondent company requested the so-called price cutters to "cooperate with the movement on its line of merchandise." It was also part of the duty of the company's agents to report price cutters to the proper head officials occurring in the district of which the said agent had jurisdiction and frequently competitor jobbers did likewise. Under these circumstances the rule of the Lorillard Company was to write to the offending jobber and request him to cease price cutting, furnishing him with one of the circulars heretofore referred to. On August 24, 1921, a jobber reported a competitor at La Crosse, Wisconsin, for so-called price cutting, requesting that means be taken to prevent the same. The Lorillard Company replied to the complainant that they "have been working on the subject matter of his complaint of August 24th for the past ten days and are pleased to advise that the parties referred to will, commencing this day, sell our products on a basis that will show a legitimate profit" and further stated that Wisconsin had been "slow in lining up." Operating in this way, so-called price cutters were brought back in line and from June 1 to December 31, 1921, not more than 15 or 20 so-called price cutters were dropped from the direct purchasing list of the Lorillard Company.

Respectfully submitted.

GEORGE MCCORKLE,
Trial Examiner.

51

Exhibit D—Exceptions to Findings

United States of America before the Federal Trade Commission

Docket No. 886

In the matter of Wholesale Tobacco & Cigar Dealers Association of Philadelphia, Pennsylvania, its officers, directors, and members;
The American Tobacco Company, a corporation, et als.

The American Tobacco Company, by its attorneys, Junius Parker and John Walsh, excepts to the findings of facts of George McCorkle, Esq., examiner in this matter, as follows:

1. Excepts to the finding that the Wholesale Tobacco & Cigar Dealers Association of Philadelphia is (as at the time of the report) composed of individuals, partners, and corporations engaged in sell-

ing cigars, cigarettes, and other tobacco products in the State of Pennsylvania and neighboring States.

2. Excepts to the finding that Messrs. Eberbach and others, and their successors, have been continuously and now are (as at the time of the report) officers of said association.

3. Excepts to the finding that Messrs. Shipton and others, and their successors, have been continuously (up to the time of the report) the directors of said association.

4. Excepts to the finding that any respondents in this proceeding still are (as at the time of the report) members of said association.

5. Excepts to the failure to find that such association has ceased to exist and therefore has ceased to have officers, directors, or members.

6. Excepts to the finding that Messrs. Eberbach and others, Hartman & Son, and Murphy Bros., were engaged in selling tobacco products of any kind in the several States of the United States or causing their products to be transported from their places of business to purchasers at various points throughout the United States.

7. Excepts to the finding that any of the respondents are still members of the Wholesale Tobacco & Cigar Dealers Association of Philadelphia.

8. Excepts to the finding that any acts and things done by members of said association restricted competition between or among them.

9. Excepts to the finding that The American Tobacco Company is engaged in the manufacture of cigars.

10. Excepts to the finding that among the purchasers of the products of The American Tobacco Company are members of the Wholesale Tobacco & Cigar Dealers Association of Philadelphia, as such.

11. Excepts to the finding (if it is intended to be so found) that competition between the manufacturing companies was in any way restricted by acts and things done by any of the respondents.

12. Excepts to the finding that the membership of said association consisted of all except one or two of the wholesale tobacco and cigar dealers in the city of Philadelphia and two jobbing firms in Camden, N. J.

13. Excepts to the finding indicating the duties of several committees of the said association.

14. Excepts to the finding that The American Tobacco Company sells its products at prices designated in certain price lists, except in so far as such finding is intended to imply merely that it follows the customary and proper and lawful method of preparing and distributing a price list among its customers.

15. Excepts to the finding that

* Raising the price to the retailer by the association from eight to seven per cent. * * * caused the retailers and subjobbers * * *

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to use all the ingenuity and persuasion they could command to 'break' the prices fixed by the association."

16. Excepts to the finding that the president of the association and its committee of investigation were busy hearing reports and investigating complaints.

17. Excepts to the finding that the president of the association wrote to a certain jobber in Manayunk, Pennsylvania, admonishing him "that if he continued to cut prices . . . he would be compelled to take the matter up with New York."

18. Excepts to the finding that the president of the association stated "that he was unable to get any satisfaction from the so-called price cutter and that pressure from the above (meaning the large manufacturers) 'would be the only method of handling them.'"

19. Excepts to the finding that the president and treasurer admonished a certain jobber of Camden, N. J., "to abide by the discounts fixed by the association."

20. Excepts to the finding that the "Camden price cutter was dropped from the direct buying list of the respondent, The American Tobacco Company."

21. Excepts to the finding (if it is intended to be so found) that there is any connection between the findings excepted to in the last two preceding exceptions.

22. Excepts to the finding that prior to the organization of said association there were "quite as many tobacco dealers in the Philadelphia district known as sub-jobbers as there were regular . . . jobbers."

23. Excepts to the finding that sub-jobbers had been recognized by large tobacco manufacturers in any way.

24. Excepts to the finding that any of said sub-jobbers had made "many thousands of retail customers."

25. Excepts to the finding that the "smallest shoeshine parlor" in Philadelphia could purchase tobacco products at any given price at any price.

26. Excepts to the finding that "their (the sub-jobbers) next step was to send a petition to the president of The American Tobacco Company."

27. Excepts to the finding indicating the contents of such petition and that "no attention was paid to this petition by the president of The American Tobacco Company, and no relief was in sight from any quarter."

28. Excepts to the finding that the "president of the Philadelphia Association and its treasurer made a trip . . . to the general offices of The American Tobacco Company . . . In their conversation with the officers of the respondent manufacturers, trade conditions in Philadelphia, including the movement to establish associations, were discussed; also possibly one or two so-called price cutters were talked about."

29. Excepts to the finding that shortly before the visit referred to in the last preceding exception, or a short time thereafter, The American Tobacco Company issued its Circular No. 2783, in so far as such finding imputes, or is intended to impute any illegal or improper relationship or any relationship at all between the facts found and objected to in the last two preceding exceptions.

30. Excepts to the finding that the policy of The American Tobacco Company is "to uphold and support the prevailing prices upon their products in any tobacco district by the tobacco jobbers therein."

31. Excepts to the failure to find that the only interest that The American Tobacco Company has in the price schedule maintained by its customers is a lawful right and proper one, to-wit, the interest in maintaining adequate means of distribution for its products.

32. Excepts to the failure to find that the sale of goods by customers of The American Tobacco Company at a price that does not yield a fair margin of profit tends to discourage the activities and to drive out of business other dealers; thus lessening the means and drying up the channels of distribution to the injury of business and the prevention of the free distribution of the products of The American Tobacco Company.

33. Excepts to the failure to find that the sale of products at ten per cent. off the manufacturer's list, that is, at the jobbers' cost without provision for expense of doing business, is a practice which works an injury to the business and to the brands, trade-marks and trade-mark rights of the manufacturer, The American Tobacco Company.

34. Excepts to the failure to find that refusal to sell a customer who sells the goods of The American Tobacco Company at ten per cent off the jobbers' list or at any other price that does not give a reasonable profit is a lawful and proper action of the American Tobacco Company, for the reason that such sale is detrimental to the interests of the company in marketing its brands.

35. Excepts to the finding that a vice president of The American Tobacco Company wrote, under date of May 2, 1921, a letter to a jobber in Minneapolis, on the ground that such letter has no reference to the Philadelphia situation and therefore is immaterial, irrelevant, and incompetent.

36. Excepts to the finding that in said letter last above mentioned it was stated:

"As Mr. Hill wrote you, we are greatly interested in the matter and regret to see the tendency toward price cutting. We feel very definitely here that when jobbers have co-operated and have held such conferences as Mr. Hill has suggested (the Mr. Hill is the President of The American Tobacco Co.) then the manufacturers can step in by refusing shipments or withholding orders from the demoralizers and thereby assist those legitimate jobbers who desire to make a profit"—

on the ground that this letter is one letter in a series of correspondence and that the matter excepted to as a finding of fact, standing alone, gives an entirely false and misleading conclusion.

55 37. Excepts to the failure to find that Mr. H. B. Finch wrote Mr. Percival S. Hill a letter on or about the first day of April, 1921 (Exhibit No. 1 of October 31); and excepts to the failure to find that this letter was of a type and character (complaining of price conditions) that The American Tobacco Company had been receiving constantly for years; and excepts to the failure to find that this letter was the first of a series culminating in the letter of Mr. Hill (Mr. George W. Hill) above referred to.

38. Excepts to failure to find that Mr. Percival S. Hill replied to the letter of Mr. Finch on or about April 4, 1921, expressing regret regarding price-cutting practices on the part of certain parties whom he referred to as "our friends" "who cut prices on tobacco" and further stating in effect that he believed such activities detrimental to The American Tobacco Company's interest on the ground that it caused dissatisfaction among its customers generally; and failure to find that Mr. Hill did not propose any remedy other than to suggest that it was a matter which the jobbers might correct.

39. Failure to find that Mr. Hill's reference to a "conference proposed merely friendly discussions among jobbers to promote goodwill and not an unlawful price-fixing agreement. (See Hill Sta. Min. 824, 825.)

40. Excepts to failure to find that Mr. Finch wrote to Mr. Hill on April 6th (Exhibit 3, October 31), after Mr. Hill had gone to Europe, a letter which Mr. Hill never received and which letter was never answered until Mr. Finch wrote again to Mr. Hill on April 28th (Exhibit 4, October 31), asking if the matter had received further consideration, and that thereupon Mr. George W. Hill wrote under date of May 2nd, the letter above referred to.

41. Excepts to failure to find that Mr. George W. Hill in his letter of May 2nd stated that cooperation could not be had between manufacturers and further stated that where a condition of demoralization existed there was little that The American Tobacco Company could do.

42. Excepts to failure to find that the purport of Mr. George W. Hill's letter of May 2nd, when taken in conjunction with the other correspondence with Mr. Finch, was merely a reply to the letter of April 6th and April 28th of Mr. Finch (the letter of April 6th having been ignored for merely a month), which reply while couched in sympathetic language, meant and was intended to mean that The American Tobacco Company was taking no action and was contemplating no action with regard to the matters complained of.

43. Excepts to the failure to find that no action was taken or threatened or intended with regard to any matters referred to in the Finch correspondence.

44. Excepts to the finding that the general sales manager of The American Tobacco Company wrote to one of their agents: "Not to arrange any meetings for your jobbers. We do not want to be a part of any organization whatever but you should suggest to the jobbers that it is their duty to get together themselves. We will insist upon the maintenance of the price that I suggested to you as all jobbers with whom I came in contact advised me that this is the prevailing price in this community."

45. Excepts to the finding that the two respondent manufacturing companies manifested their interest in and co-operation with the Philadelphia Tobacco and Cigar Dealers Association and its members by cutting off from their direct list certain jobbers whose conduct in deviating from the prices fixed by the association, in the sale of products of such companies, was brought to their attention.

46. Excepts to the failure to find that in every instance in which The American Tobacco Company ceased to sell any customer, it acted without reference to the wishes of any association, but voluntarily and within its legal rights and in accordance with sound principles of business ethics.

47. Excepts to the finding that a firm of jobbers on August 28, 1921, was dropped from the direct buying list of The American Tobacco Company, in so far if at all, said finding intends to imply any impropriety of conduct.

48. Excepts to failure to find that the firm referred to (which is found to have sold its products at ten per cent. off the list) was cut off by The American Tobacco Company for sound reasons and that such action was lawful and sound as a matter of business judgment and creditable as a matter of business ethics.

49. Excepts to the finding that the firm referred to in the last preceding exception was reinstated on the direct buying list of The American Tobacco Company after having made assurances that they would desist from so-called price cutting.

50. Excepts to the finding that "a representative of The American Tobacco Company . . . stated to Seider that it would be better for him to join the association, that he might not get his goods if he made any more disturbance."

51. Excepts to the finding that a month or two after the facts found and objected to in the immediately preceding exception, Seider's orders to The American Tobacco Company was cancelled and that The American Tobacco Company refused to ship Seider any more of its product for a certain time.

52. Excepts to failure to find that The American Tobacco Company was well within its legal rights in its action taken with regard to Seider, the customer last above mentioned.

53. Excepts to the failure to find that the policy announced by The American Tobacco Company in its circular Number 2783 (commission's Exhibit No. 10) was a fair, reasonable and legal policy which The American Tobacco Company had a right to pursue in the sale and distribution of its products.

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62 54. Excepts to the failure to find that there is no evidence to support a finding that the American Tobacco Company has indulged in any unfair methods of competition or has violated the provisions of section 5 of the Federal Trade Commission act.

55. Excepts to the failure to find that the proceedings should be dismissed as to The American Tobacco Company on account of lack of proof of the matters alleged against The American Tobacco Company in the complaint herein.

Dated, April 27, 1923.

Respectfully submitted.

JUNIUS PARKER,
JOHN WALSH,

Attorneys for Respondent The American Tobacco Company.

63 *Exhibit E.—Findings as to the facts and conclusion*

United States of America before Federal Trade Commission

At a regular session of the Federal Trade Commission, held at its office in the city of Washington, D. C., on the 16th day of February, A. D., 1924, present: Huston Thompson, chairman; Vernon W. Van Fleet, Nelson B. Gaskill, John F. Nugent, commissioners

Docket No. 886

In the matter of Wholesale Tobacco & Cigar Dealers Association of Philadelphia, Pennsylvania, its officers, directors and members, The American Tobacco Company, et al.

Pursuant to the provisions of an act of Congress approved September 26, 1914, entitled, "An act to create a Federal Trade Commission, defining its powers and duties and for other purposes," the Federal Trade Commission issued and served a complaint upon the respondents, the Wholesale Tobacco & Cigar Dealers Association of Philadelphia, Pennsylvania, its officers, directors, and mem-

64 as follows: Nelson F. Eberbach, president; Harvey D. Narigan and James Murphy, vice presidents; Herman J. Krull, treasurer; Paul L. Brogan, secretary, respectively; Arthur Shipton, Frank Kuhn, William Cohen, Bennett Hollard, Frank Blatt, H. Stewart Moorhead, Philip Godeski, William D. Shepherd, and Morris Hochman, its directors; and the following members: Nelson F. Eberbach, John S. Eberbach, and Joseph H. Ederbach, partners doing business under the name and style A. B. Cunningham & Company; Dussel, Goodloe & Company, Incorporated, a corporation; Philip Godeski and Sidney G. Godeski, partners doing business under the name and style Franklin Tobacco Company; Frank Kuhn, George Kuhn, and John Kuhn, partners doing business under the name and style F. Kuhn & Brother; Peter J. Murphy and John Murphy, partners doing business under the name and style Peter J. Murphy Company; Charles A. Krull and Herman Krull, partners

doing business under the name and style Charles A. Krull, Baum & Neely, Incorporated, a corporation; William F. Shepherd and John G. Shepherd, partners doing business under the name and style S. Shepherd's Sons; T. H. Hart and A. I. Mitchell, partners doing business under the name and style T. H. Hart & Company; F. Hartmann & Son, a corporation; Yahn & McDonnell Company, a corporation; M. Blumenthal, John Wagner, and Joseph W. Wagner, partners doing business under the name and style of John Wagner & Sons; Harvey D. Narrigan, an individual doing business under the trade name H. D. Narrigan & Company; Victor Fermani; Anna E. Bechtold, an individual doing business under the trade name James S. Bechtold; Frank Blatt, Arthur Shipton, and Thomas

65 F. Cooper, partners doing business under the name and style Shipton & Payne Company; H. S. Moorhead, an individual doing business under the trade name Duncan & Moorhead; Bennett Hollard; P. Hochman; M. J. Dalton Company, a corporation; Brucker & Boghien, Incorporated, a corporation; Fred G. H. Woerner, an individual doing business under the trade name Fred G. H. Woerner & Sons; S. T. Banham and A. L. Banham, partners doing business under the name and style S. T. Banham & Brothers; E. Cohen and William Cohen, partners doing business under the name and style E. Cohen & Sons; John Murphy, and James Murphy, partners doing business under the name and style Murphy Brothers; American Tobacco Company, a corporation; and P. Lorillard Company, a corporation; charging them and each of them with the use of unfair methods of competition in commerce in violation of the provisions of said act.

Respondents, John Wagner and Joseph W. Wagner, trading as John Wagner & Sons, filed their joint answer denying the use of the methods of competition charged in the complaint; respondent M. J. Dalton Company filed its answer averring that for at least four months prior to the service of said complaint the Wholesale Tobacco & Cigar Dealers Association of Philadelphia had been practically abandoned and that from that time to the filing of said answer there had been no associated action, agreement, resolution, or understanding between said association and the officers and among members thereof, or any of them in connection with the business of

66 buying and selling cigars, cigarettes, and other tobacco products; excepting Yahn & McDonnell Company, Baum & Neely, Inc., John Murphy and James Murphy, partners doing business under the name and style of Murphy Brothers (none of whom filed answers), all the other respondent members, officers, and directors of the Wholesale Tobacco & Cigar Dealers Association of Philadelphia and the said Wholesale Tobacco & Cigar Dealers Association of Philadelphia, filed their joint answer averring that for at least four months prior to the filing of the complaint the Wholesale Tobacco & Cigar Dealers Association of Philadelphia had been practically abandoned and that since that time to the filing of said joint answer there had been no associated action, agreement, resolu-

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tion, or understanding between said association and the officers and members thereof, or among the members thereof, or any of them in connection with the business of buying and selling cigars, cigarettes, and other tobacco products, respondents American Tobacco Company and P. Lorillard Company filed their separate answers denying the use of the methods of competition charged in the complaint.

Thereupon hearings were had and evidence was thereupon introduced in support of the allegations of said complaint and on behalf of the respondents before George McCorkle, Esq., an examiner of the Federal Trade Commission theretofore duly appointed and thereupon this proceeding came on for final hearing and the commission having heard argument of counsel and having duly considered the record (the testimony having been reduced to writing and filed in the office of said commission) and being now fully advised in the premises, makes this its findings as to the facts and conclusion.

67 (except that the proceeding having been dismissed as to the P. Lorillard Company, the Federal Trade Commission does not make any findings as to the facts as against P. Lorillard Company):

FINDINGS AS TO THE FACTS

Paragraph one: Respondent, Wholesale Tobacco & Cigar Dealers Association of Philadelphia, Pennsylvania, was a voluntary, unincorporated association organized in the year 1920 and existing until at least June 9, 1922. It was composed of various individuals, partnerships, and corporations engaged in the business of selling tobacco and tobacco products at wholesale to wholesale and retail dealers in the State of Pennsylvania and in the neighboring States, and, in some instances, doing a retail business in said commodities in addition to said wholesale business. Said association will be hereinafter referred to as the association.

The original officers of the association elected on September 2, 1920, were the following respondents: Nelson F. Eberbach, president; Harvey D. Narrigan, vice president; James Murphy, vice president; Herman J. Krull, treasurer; Paul L. Brogan, secretary; and Arthur Shipton, Frank Kuhn, William Cohen, Bennett Holland, Frank Blatt, H. Stewart Moorhead, Philip Godeski, William D. Shepherd, and M. Hochman, directors. Such respondents remained and continued as such officers of the association from September 2, 1920, until at least January 6, 1922, except that respondent William

68 Fink, on June 6, 1921, was elected second vice president in place of respondent James Murphy, and said respondent William Fink continued as such vice president from June 6, 1921, until at least January 6, 1922.

At a meeting of the association held September 2, 1920, the following committees were appointed, viz.

Executive committee: Respondents H. Stewart Moorhead, chairman; Frank Kuhn, John Murphy, Philadelphia; Philip Godeski, and William Cohen;

Finance committee: Respondents M. Hochman, chairman; L. Fink and James Bechtold;

Membership committee: Respondents Arthur Shipton, chairman; F. Hartmann and Myer Blumenthal.

These respondents continued as members, respectively, of the executive committee, finance committee, and membership committee until at least January 6, 1922.

The membership of the association comprised all of the wholesale tobacco and cigarette dealers in Philadelphia and Camden, N. J., except Charles Seider and Fringes Sons.

The following named respondents with their several principal places of business in the city of Philadelphia, State of Pennsylvania, were at all times hereinafter mentioned and still are engaged in selling cigarettes and other tobacco products at wholesale to wholesale and retail dealers in the several States of the United States. They caused said products when so sold to be transported from their respective places of business in the said city of Philadelphia to purchasers thereof in the various States of the United States:

(a) Nelson F. Eberbach, John S. Eberbach, and Joseph H. Eberbach, partners doing business under the name and style of A. B. Cunningham & Company; Dusel, Goodloe & Company, Incorporated, a corporation organized under the laws of the State of New Jersey; Philip Godeski and Sidney G. Godeski, partners doing business under the name and style Franklin Tobacco Company; Peter J. Murphy and John Murphy (partners doing business under the name and style Peter F. Murphy Company; Charles A. Krull and Herman Krull, partners doing business under the name and style Charles A. Krull; William D. Shepherd and John G. Shepherd, partners doing business under the name and style of S. Shepherd's Sons; T. H. Hart and A. I. Mitchell, partners doing business under the name and style of T. H. Hart & Company; Yahn & McDonnell Company, Incorporated, a corporation organized under the laws of the State of Pennsylvania; M. Blumenthal; John Wagner, and Joseph W. Wagner, partners doing business under the name and style of John Wagner & Sons; Harvey D. Narrigan, an individual doing business under the trade name H. D. Narrigan & Company; Victor Ferman; Bennet Hollard; P. Hochman; M. J. Dalton Company, a corporation organized under the laws of the State of Pennsylvania; Brucker & Boghien, Incorporated, a corporation organized under the laws of the State of Pennsylvania; S. T. Banham and A. L. Banham, partners doing business under the name and style S. T. Banham & Brothers; E. Cohen and William Cohen, partners doing business under the name and style E. Cohen & Sons.

The following named respondents with their several places of business in the city of Philadelphia, State of Pennsylvania, were at all times hereinafter mentioned and still are engaged in the business of selling cigarettes and other tobacco products

at wholesale to wholesale and retail dealers wholly within the State of Pennsylvania:

(b) Frank Kuhn, George Kuhn, and John Kuhn, partners doing business under the name and style of F. Kuhn & Brothers; Baum & Neely, Incorporated, a corporation organized under the laws of the State of Pennsylvania; Anna E. Bechtold, an individual doing business under the trade name James S. Bechtold; Frank Blatt; Arthur Shipton and Thomas F. Cooper, partners doing business under the name and style Shipton & Payne Company; H. S. Moorhead, an individual doing business under the trade name of Duncan & Moorhead; Fred G. H. Woerner, an individual doing business under the trade name Fred G. H. Woerner & Sons.

The following named respondents with their several principal places of business in the city of Camden, State of New Jersey, were at all times hereinafter mentioned and still are engaged in the business of selling cigarettes and other tobacco products at wholesale to wholesale and retail dealers in the several States of the United States, particularly in Camden, N. J., and Philadelphia, Pennsylvania. They caused, and at all times hereinafter mentioned caused, such cigarettes and tobacco products, when so sold by them, to be transported from their respective places of business in the city of Camden, N. J., to purchasers in various States of the United States, particularly in the States of New Jersey and Pennsylvania:

71 (c) F. Hartmann & Son, a corporation organized under the laws of the State of New Jersey; John Murphy and James Murphy, partners doing business under the name and style Murphy Brothers.

All of the foregoing respondents whose names are set out in subparagraphs (a), (b), and (c) were at all times during the existence of the association, members thereof and are hereinafter collectively referred to as the members, excepting that respondents John Murphy and James Murphy, trading as Murphy Brothers, were expelled from the association in April, 1921, and John Wagner and Joseph W. Wagner, partners trading as John Wagner & Sons, Yahn & McDonnell Company, and Baum & Neely, Inc., withdrew from the association some time after June, 1921. During the period of the existence of the association the members were naturally and normally in unrestricted competition with each other and with other dealers in the territory in which they sold, excepting in so far as such competition was limited, prevented and suppressed by the acts and things done by them as more particularly hereinafter set out.

Respondent, American Tobacco Company, is a corporation organized, existing, and doing business under the laws of the State of New Jersey with its principal office in Jersey City in said State and with factories in several States of the United States. It was at all times hereinafter mentioned and still is engaged in the manu-

72 manufacture of cigarettes and other tobacco products and in the sale thereof to wholesale dealers throughout the United States. It caused, during the period hereinafter mentioned, and still causes, its products, when so sold, to be transported from the point of manufacture to purchasers at points in other States of the United States. Among said purchasers were all of the respondents named in sub-paragraphs (a), (b), and (c). The said American Tobacco Company was at all times hereinafter mentioned and still is in competition with individuals, partnerships, and other corporations similarly engaged in the manufacture and sale of tobacco products in interstate commerce.

Paragraph two: During the period of the existence of the association the prices at which the respondent American Tobacco Company sold its products were fixed as follows: It supplied each of the members with a schedule of prices, denominated list prices, which were the prices suggested by said American Tobacco Company at which its products should be resold by the members to other wholesalers and to the retail trade. The prices at which such products were sold to the members were fixed by certain uniform discounts off said list in each instance, whereby the members paid the manufacturers for said products said list prices minus said discounts. Wholesale and retail dealers in tobacco products throughout the United States, including the members, were, during the existence of the association, and still are, dependent upon the American Tobacco Company for their supply of the American Tobacco Company's products, which constitute a large portion of the tobacco products dealt in by such wholesale and retail dealers. The extent of this dependence is such that when any dealer is unable to secure the products of the American Tobacco Company, his business is substantially crippled and he is placed at a competitive disadvantage with dealers supplied with said products.

73 On September 16, 1920, the association and its members, acting through the association and co-operating with it and with each other, agreed upon a schedule of fixed prices at which the members should thereafter resell to their dealer-customers the tobacco products dealt in by the members, including the products of the American Tobacco Company and, having thus fixed such uniform re-sale prices, adopted a system for the maintenance and enforcement of said re-sale prices by the members and by all of the wholesale dealers in the trade who did business in the territory served by the members. In the course of said cooperative enforcement of said system the members and the association, through its officers and directors, did, among other things, during the period from September 16, 1920, until the end of 1921, the following acts and things:

(a) Undertook among themselves to maintain said re-sale prices and did maintain same;

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(b) Caused the fixation of said re-sale prices to appear as the formal action of the association by an appropriate resolution in that behalf;

(c) Caused the association to notify all members of said acts;

(d) Sought by persuasion and intimidation to cause all dealers who sold in the general selling territory of the members, including those members who discontinued the maintenance of said re-sale prices in violation of their aforesaid undertaking so to do, to maintain said re-sale prices;

74 (e) Sought and secured the cooperation of the American Tobacco Company in such persuasion and intimidation, which said American Tobacco Company rendered by notifying its trade in the territory of the members, by circular letters and otherwise that the notifier would refuse to furnish further supplies of its products to any wholesale dealer who failed to re-sell such products at the prices fixed in the aforesaid letter, or implying the same in veiled language;

(f) Caused reports of the names of said dealers who failed to maintain said re-sale prices to be reported by the members and their salesmen, either directly to the association, or through the respective members in each instance to the association, and upon receiving such reports, in turn, reported the names of such offending dealers to the American Tobacco Company, requesting its assistance in the enforcement of said system by having said American Tobacco Company refuse to further supply said offending dealers with any of its products;

(g) As a result of reporting said names to the American Tobacco Company and requesting its cooperation as set out in specification (f) hereof, secured the cooperation and assistance of the American Tobacco Company in that behalf and said American Tobacco Company, upon receiving such information, proceeded to investigate said instances of price-cutting and upon finding that the offending dealer was cutting prices and refusing and failing to maintain the said re-sale prices, refused to furnish said offending dealer with further supplies of its products;

75 (h) Employed a special agent to spy upon the members and other dealers in the aforesaid territory in order to ascertain if any of them were failing to maintain said re-sale prices, and upon discovering that a member or dealer was so doing to report the name of such offender to the association, which, upon receiving such reports, sought and secured the cooperation of the American Tobacco Company with regard to such offenders in like manner and with like results as set out in specifications (f) and (g).

Paragraph three: During the period aforesaid in which the association adopted and maintained uniform re-sale prices for said American Tobacco Company's products in the manner and by the means set out in paragraph two hereof, it was the general policy of said

American Tobacco Company to assist groups of its jobbers who would fix or who had fixed by co-operation among themselves uniform re-sale prices on its products, by refusing shipments of its goods to such of its jobbers who had re-sold or who would re-sell at prices lower than those fixed by such jobbers by co-operation among one another. Such was the policy of said American Tobacco Company with respect to respondent association and its members. The representatives of said American Tobacco Company in the territory in which the members re-sold its products were instructed by their superiors to carry out such policy in Philadelphia and vicinity and because of such instructions such representatives carried out such policy.

Said American Tobacco Company knew of the price agreements made by the association and its members as described in paragraph two hereof and agreed with the said association and its members to help them maintain the price agreements described in paragraph two hereof.

Charles Seider, one of said American Tobacco Company's distributors in Philadelphia and a competitor of the members, having declined an invitation of the president and treasurer of the respondent association to join its membership, was urged by the division manager of the American Tobacco Company in charge of its Philadelphia territory, to join the association. Said division manager requested said Seider to join the association and not to sell at prices below those fixed by it and its members, but to comply with the uniform prices put into effect by the members and by the association as described in paragraph two hereof. Said Seider refused to join the association, or to abide by its prices, and the said American Tobacco Company, after investigating a complaint made to it by the association and its members that the said Seider was re-selling its products at prices less than those fixed by the association and its members, discontinued selling to said Seider in the period from April 20, 1921, to August 13, 1921, for the purpose of assisting the association and its members to maintain the price agreements as described in paragraph two hereof. After said Seider, following the suggestion made to him by the said division manager that if he joined respondent association, it would help him get the shipments that had been withheld from him by said American Tobacco Company, applied to the vice-president of the respondent association for membership therein, the said American Tobacco Company reinstated him as one of its customers and forwarded to him shipments that had been withheld in the period from April 20, 1921, to August 13, 1921.

Respondents John Murphy and James Murphy, partners doing business under the name and style Murphy Brothers, were expelled from the association in April, 1921, because they were accused by said association of reselling at prices less than those fixed by the

40 FEDERAL TRADE COMMISSION VS. AMERICAN TOBACCO CO.

association. The American Tobacco Company, after investigating complaints made to it by the association that said Murphy Brothers were re-selling its products at prices less than those fixed by the association and its members, discontinued selling said Murphy Brothers in the period from August 29, 1921, to October 4, 1921, for the purpose of assisting the association and its members in maintaining the prices which had been fixed as set out in paragraph two hereof.

For the purpose of assisting the association and its members in maintaining the prices fixed by them as set out in paragraph two hereof, the American Tobacco Company in 1921, because of complaints made to it by the association and its members that respondents Fermari and Blumenthal were re-selling its products at prices less than those fixed by the association and its members, withheld shipments of its products to said Fermari and Blumenthal while it was investigating the prices at which Fermari and Blumenthal were re-selling its products.

Paragraph four: The aforesaid acts and things done by said respondents and each of them had the tendency and capacity to constrain all wholesale dealers doing business in the territory 78 above mentioned to uniformly sell the aforesaid products to their dealer-customers at the prices fixed by the association and its members as hereinbefore set out and hence to hinder and suppress all competition in the wholesaling of said products in said territory, particularly among the members of the association and further to hinder and restrict competition between all retail dealers in said territory. Said respondents' practice thus tended to unduly hinder and obstruct the free and natural flow of commerce in the channels of interstate commerce.

CONCLUSION

The practices of said respondents under the conditions and circumstances described in the foregoing findings are unfair methods of competition in interstate commerce and constitute a violation of the act of Congress approved September 26, 1914, entitled "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes."

By the commission:

[SEAL.]

HUSTON THOMPSON,
Chairman.

Dated this 16th day of February, A. D. 1924.

Attest:

ORIS B. JOHNSON,
Secretary.

Exhibit F—Order to cease and desist

United States of America Before Federal Trade Commission

At a regular session of the Federal Trade Commission, held at its office in the city of Washington, D. C., on the 16th day of February, A. D. 1924, present: Huston Thompson, chairman, Vernon W. Van Fleet, Nelson B. Gaskill, John F. Nugent, commissioners.

Docket No. 886

In the matter of Wholesale Tobacco & Cigar Dealers Association of Philadelphia, Pennsylvania, its officers, directors, and members, the American Tobacco Company, et al.

This proceeding having been heard by the Federal Trade Commission upon the complaint of the commission, the answers of respondents, the testimony and evidence and the argument of counsel, and the commission having made its findings as to the facts and having reached its conclusion that the respondents hereinafter named have violated the provisions of the act of Congress approved September 26, 1914, entitled, "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes,"

Now, therefore, it is ordered, that the Wholesale Tobacco & Cigar Dealers Association of Philadelphia, Pennsylvania, and its officers, directors, and members as follows: Nelson F. Eberbach, president; Harvey D. Narrigan and James Murphy, vice-presidents; Herman J. Krull, treasurer; Paul L. Brogan, secretary, respectively; Arthur Shipton, Frank Kuhn, William Cohen, Bennett Holland, Frank Blatt, H. Stewart Moorhead, Philip Godeski, William D. Shepherd, and Morris Hochman, its directors; and the following members: Nelson F. Eberbach, John S. Eberbach, and Joseph H. Eberbach, partners doing business under the name and style A. B. Cunningham & Company; Dusel, Goodloe & Company, Incorporated, a corporation; Philip Godeski and Sidney G. Godeski, partners doing business under the name and style Franklin Tobacco Company; Frank Kuhn, George Kuhn, and John Kuhn, partners doing business under the name and style F. Kuhn & Brother; Peter J. Murphy and John Murphy, partners doing business under the name and style Peter J. Murphy Company; Charles A. Krull and Herman Krull, partners doing business under the name and style Charles A. Krull; Baum & Neely, Incorporated, a corporation; William F. Shepherd and John G. Shepherd, partners doing business under the name and style S. Shepherd's Sons; T. H. Hart and A. I. Mitchell, partners doing business under the name and style T. H. Hart & Company; F. Hartmann & Son, a corporation; Yahn & McDonnell Company, a corporation; M. Blumenthal, John Wagner, and Joseph W. Wagner, partners doing business under the name and style of John Wagner & Sons; Harvey D. Narrigan, an individual doing business under the trade name H. D. Narrigan & Company; Victor Fermani; Anna E. Bechtold.

an individual doing business under the trade name James S. Bechtold; Frank Blatt, Arthur Shipton, and Thomas F. Cooper, partners doing business under the name and style Shipton & Payne Company; H. S. Moorhead, an individual doing business under the trade name Duncan & Moorhead; Bennett Hollard; P. Hochman; M. J. Dalton Company, a corporation; Brucker & Boghien, Incorporated, a corporation; Fred G. H. Woerner, an individual doing business under the trade name Fred G. H. Woerner & Sons; S. T. Banham and A. L. Banham, partners doing business under the name and style S. T. Banham & Brothers; E. Cohen and William Cohen, partners doing business under the name and style E. Cohen & Sons; John Murphy and James Murphy, partners doing business under the name and style Murphy Brothers, cease and desist from fixing, enforcing, and maintaining, and from enforcing and maintaining, by combination, agreement, or understanding among themselves, or with or among any of them, or with any other wholesaler of cigarettes or other tobacco products, re-sale prices for cigarettes or other tobacco products dealt in by such respondents, or any of them, or by any other wholesaler of cigarettes or other tobacco products;

And it is further ordered that The American Tobacco Company cease and desist from assisting and from agreeing to assist any of its dealer-customers in maintaining and enforcing in the re-sale

of cigarettes and other tobacco products manufactured by the
82 said The American Tobacco Company, re-sale prices for such cigarettes and other tobacco products, fixed by any such dealer-customer by agreement, understanding, or combination with any other dealer-customer of said The American Tobacco Company.

It is further ordered that all of said respondents and each of them shall file with the Federal Trade Commission, within sixty (60) days from the date of the service upon them of this order, a report in writing stating the manner and form in which this order has been conformed to.

By order of the commission: Commissioner Van Fleet dissenting in attached memorandum.

[SEAL.]

OTIS B. JOHNSON,
Secretary.

Federal Trade Commission, United States of America, MCMXV.

83 *Exhibit G—Dissent by Commissioner Van Fleet*

File No. 886

I dissent in this case as to the order against the American Tobacco Company. The charge is that said company conspired with the Wholesale Dealers Association to maintain prices. The association was interested in maintaining the price that its members might obtain more for their goods. The object of the American Company was not the same as the association. The American Company sold its goods upon a ten per cent discount to the members of the association and its price was in no wise affected by the cutting of dealers.

Of course this did not necessarily prevent the American Company from conspiring with the association but it is a fact to be considered whether there was such conspiracy. If dealers were cutting prices and demoralizing the trade which at the time charged had proceeded to the extent of ruin if continued the American Company had a legal right to refuse to continue business dealings with such concerns. It is evident that a concern cannot stay in business if it sells at no profit as the evidence shows was the case here. The mere fact that the acts of the American Company were contemporaneous with those of the association is not determinative.

Of course conspiracy is often incapable of direct proof but when resort is had to circumstantial evidence as in this case the proof should rise above the dignity of mere suspicion. Some of the evidence relied upon to sustain the order hardly ever rises to that dignity. Without summarizing the evidence to my mind it appears that the truth is that the American Company had nothing to do with the organization of nor conduct of the association and I know of no proof to the contrary. Also I believe its acts were taken independently of the association and no real proof to the contrary appears. The commission dismissed the case against the Lorillard Company for lack of proof and I believe that eliminating evidence of acts of others for which the American Company was in no wise responsible and discarding mere conjecture there is not proof to warrant an order against the American Company.

V. W. VAN FLEET.
Commissioner.

October 30, 1923.

1407 United States Circuit Court of Appeals for the Second
Circuit

THE AMERICAN TOBACCO COMPANY, PETITIONER
against
FEDERAL TRADE COMMISSION, RESPONDENT

OCTOBER 20, 1925.

Before: ROGERS, MANTON, and HAND, Circuit Judges

JOHN WALSH, JUNIUS PARKER, JONATHAN H. HOLMES, for
petitioner.

W. H. FULLER, chief counsel; EDWARD L. SMITH, for respondent.

Petition by the American Tobacco Company against the Federal Trade Commission to review an order of the commission requiring petitioner to cease and desist from certain practices found by the commission to be unfair methods of competition in interstate commerce.

The facts are stated in the opinion.

ROGERS, Circuit Judge: The Federal Trade Commission on May 29, 1922, served upon the American Tobacco Company, petitioner

herein, and certain other corporations, partnerships, and individuals, a complaint charging them with unfair methods of competition in interstate commerce in violation of section 5 of the act of Congress of September 26, 1914, 38 St. 717, c. 311.

The complaint upon which the Federal Trade Commission proceeded, and upon which it entered the order herein involved, was brought against the Wholesale Tobacco and Cigar Dealers Association of Philadelphia, its officers, directors, and members. And the American Tobacco Company and the P. Lorillard Company were also made parties. These two companies are New Jersey corporations, each having its principal place of business in Jersey City, and each is engaged in the manufacture of cigars, cigarettes, and other tobacco products and in the sale thereof to wholesale and retail dealers throughout the United States. It is not alleged in the complaint that either of these corporations ever were members of the Wholesale Tobacco and Cigar Dealers Association, or were in any manner instrumental in organizing it. The essential allegations of the complaint are found in the margin.*

* Paragraph two: At the time of the organization of the association, the prices at which said manufacturers sold their products were fixed as follows: "Said manufacturers severally supplied the members with a schedule of prices denominated 'list prices' which were the prices severally suggested by said manufacturers at which their products should be resold by the members to the retail trade. The prices at which said products were sold to the members were fixed by certain uniform discounts off said list in each instance, whereby the members paid to said manufacturers for said products said list prices minus said discounts. Wholesale and retail dealers in tobacco products throughout the United States, including respondent dealers set out in Groups I, II, and III above, then were and still are dependent upon respondent manufacturers for their supply of a large portion of the products in which they deal. The extent of this dependence is such that when any such dealer is unable to secure the products of respondent manufacturers or either of them his business is substantially crippled, and he is placed at a competitive disadvantage with dealers supplied with said products. In the year 1920 the association and its members acting through the association and cooperating and conspiring with it, and with each other, agreed upon a schedule of fixed prices at which the members should thereafter resell to their dealer customers the products dealt in by the members including the products of respondent manufacturers, and having thus fixed said uniform resale prices, adopted a system for the maintenance and enforcement of said resale prices by the members and by all other wholesale dealers in the trade who did business within the territory served by the members. Respondent manufacturers cooperated and conspired with the association and its members and participated in said price maintenance system as is more particularly hereinafter set out. In the course of afterward cooperative enforcement of said system, the members, and the association through its officers and directors, did, amongst others, and still do, the following acts and things:

- (a) Understood among themselves to maintain said resale prices, and did maintain same;
- (b) Caused the fixing of said resale prices to appear as the formal action of the association by an appropriate resolution in that behalf;
- (c) Caused the association to notify all members of said action;
- (d) Sought by persuasion and intimidation to cause all dealers in the territory above referred to, including those members of the association who discontinued the maintenance of said resale prices in violation of their afterward undertakings so to do, to maintain said resale prices;
- (e) Sought and secured the cooperation of respondent manufacturers in such persuasion and intimidation, which each said manufacturer rendered by notifying the trade in afterward territory, by circular letters and otherwise, that the seller would refuse to furnish further supplies of his products to any wholesale dealer who failed to resell such products at the prices fixed in afterward schedule, or implying the same in veiled language;
- (f) Caused reports of the names of said dealers who failed to maintain said resale prices to be reported by the members and their salesmen, either directly to the association or through the respective members in each instance to the association, and upon receiving such reports, in turn, reported the names of such offending dealers to respondent manufacturers requesting the assistance and cooperation of respondent manufacturers in the enforcement of said system by having said manufacturers refuse to further supply said offending dealers with any of their products;
- (g) As a result of reporting said names to the respondent manufacturers and requesting their cooperation, to act and in specification (f) hereof, secured the cooperation and assistance of said manufacturers in that behalf and each said manufacturer upon receiving such information proceeded to investigate said instances of price cutting, and upon finding that the offending dealer was cutting prices, and refusing to maintain afterward resale prices, refused to furnish said offending dealer with further supplies of its, the manufacturer's, products, until the offender gave such promises

The various defendants, including the American Tobacco Company, put in separate answers to the complaint. The American Tobacco Company, in its answer, admitted certain mere formal allegations of the complaint and declared as to certain others that it had no knowledge or information and could neither admit or deny them, and demanded strict proof thereof "if they be material." And it concluded by declaring that "except as to those matters herein specifically admitted, and those matters of which it has no knowledge or information as herein alleged, it denies each and every allegation of the complaint."

The commission took a large amount of testimony, the record containing 1,400 printed pages. Having taken time to consider, 1411 it made its findings of fact. The findings which relate to the American Tobacco Company are stated in the margin.*

and assurances of maintaining said resale prices in the future as were satisfactory to said manufacturers and the association in that regard;

(b) Employed special agents to spy upon the members and other dealers in the aforesaid territory in order to ascertain if any of them were or was failing to maintain said resale prices, and upon discovering that a member or a dealer was so doing, to report the name of such offender to the association. Upon receiving such reports, sought and secured the cooperation of the manufacturers with regard to said offenders in like manner and with like results as set out in specifications (f) and (g);

Paragraph three: The aforesaid acts and things done by respondents and each of them had and still have the tendency and capacity to constrain all wholesale dealers doing business in the territory above mentioned to uniformly sell the aforesaid products to their dealer-customers at the prices fixed by the association and its members as hereinafter set out, and hence to hinder and suppress all competition in the wholesaling of said products in said territory, particularly among the members of the association and further to hinder and restrict competition between all retail dealers in said territory. Respondents' said practices thus tended and still tend to unduly hinder and obstruct the free and natural flow of commerce in the channels of interstate commerce.

Paragraph four: The above acts and things done by respondents and by each of them constitute unfair methods of competition in commerce, within the intent and meaning of section 5 of an act of Congress entitled, "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," approved September 26, 1914.

* Paragraph two: During the period of the existence of the association the prices at which the respondent American Tobacco Company sold its products were fixed as follows: It supplied each of the members with a schedule of prices, designated list prices, which were the prices suggested by said American Tobacco Company at which its products should be resold by the members to other wholesalers and to the retail trade. The prices at which such products were sold to the members were fixed at certain uniform discounts off said list in each instance, whereby the members paid the manufacturers for said products said list prices minus said discounts. Wholesale and retail dealers in tobacco products throughout the United States, including the members, were, during the existence of the association, and still are, dependent upon the American Tobacco Company for their supply of the American Tobacco Company's products, which constitute a large portion of the tobacco products dealt in by such wholesale and retail dealers. The extent of this dependence is such that when any dealer is unable to secure the products of the American Tobacco Company, his business is substantially crippled and he is placed at a competitive disadvantage with dealers supplied with said products.

On September 16, 1920, the association and its members, acting through the association and cooperating with it and with each other, agreed upon a schedule of fixed prices at which the members should thereafter resell to their dealer-customers the tobacco products dealt in by the members, including the products of the American Tobacco Company and, having thus fixed such uniform resale prices, adopted a system for the maintenance and enforcement of said resale price by the members and by all of the wholesale dealers in the trade who did business in the territory served by the members. In the course of said cooperative enforcement of said system the members and the association through its officers and directors, did among other things, during the period from September 16, 1920 until the end of 1921, the following acts and things:

(a) Undertook among themselves to maintain said resale prices and did maintain same;

(b) Caused the fixation of said resale prices to appear as the formal action of the association by an appropriate resolution in that behalf;

(c) Caused the association to modify all members of said acts;

(d) Sought by persuasion and intimidation to cause all dealers who sold in the general selling territory of the members, including those members who discontinued the maintenance of said resale prices in violation of their aforesaid undertaking so to do, to maintain said resale prices;

(e) Sought and secured the cooperation of the American Tobacco Company in such persuasion and intimidation, which said American Tobacco Company rendered by notifying its trade in the territory of the members, by circular letters and otherwise that the latter would refuse to furnish further supplies of its products to any wholesale dealer who failed to resell such products at the prices fixed in the aforesaid letter, or implying the same in coded language;

An examination of the findings shows that it was found:

1. That the American Tobacco Company supplied to each of the members of the Wholesale Tobacco and Cigar Dealers Association

1412 (f) caused reports of the names of said dealers who failed to maintain said resale prices to be reported by the member and their salesmen, either directly to the association, or through the respective members in each instance to the association, and upon receiving such reports, in turn, reported the names of such offending dealers to the American Tobacco Company, requesting its assistance in the enforcement of said system by having said American Tobacco Company refuse to further supply said offending dealers with any of its products;

(g) as a result of reporting said names to the American Tobacco Company and requesting its cooperation as set out in specification (f) hereof, secured the cooperative aid and assistance of the American Tobacco Company in that behalf and said American Tobacco Company, upon receiving such information, proceeded to investigate said instances of price-cutting and upon finding that the offending dealer was cutting prices and refusing and failing to maintain the said resale price, refused to furnish said offending dealer with further supplies of its products;

(h) employed a special agent to spy upon the members and other dealers in the aforesaid territory in order to ascertain if any of them were failing to maintain said resale prices, and upon discovering that a member or dealer was so doing, to report the name of such offender to the association, which, upon receiving such reports, sought and secured the cooperation of the American Tobacco Company with regard to such offenders in like manner and with like results as set out in specifications (f) and (g).

Paragraph three during the period aforesaid in which the association adopted and maintained uniform resale prices for said American Tobacco Company's products in the manner and by the means set out in paragraph two hereof, it was the general policy of said American Tobacco Company to assist groups of its jobbers who would fix or who had fixed by cooperation among themselves uniform resale prices on its products by refusing shipments of its goods to such of its jobbers who had renounced or who would sell at prices lower than those fixed by such jobbers by cooperation among one another. Such was the policy of said American Tobacco Company with respect to respondents in the territory in which the members resold its products were instructed by their superiors to carry out such policy in Philadelphia and vicinity and because of such instruction such respondents carried out such policy.

Said American Tobacco Company knew of the price agreements made by the association and its members as described in paragraph two hereof and agreed with the said association and its members to help them maintain the price agreements described in paragraph two hereof.

Charles Bender, one of said American Tobacco Company's distributors in Philadelphia and a competitor of ten members, having declined an invitation of the president and treasurer of the respondent association to join its membership, was urged by the division manager of the American Tobacco Company in charge of its Philadelphia territory, to join the association. Said division manager requested said Bender to join the association and not to sell at prices lower than those fixed by it and its members, but to comply with the uniform prices put into effect by the members and by the association as described in paragraph two hereof. Said Bender refused to join the association, or to

1413 abide by its prices, and the said American Tobacco Company, after investigating a complaint made to it by the association and its members that the said Bender was reselling its products at prices lower than those fixed by the association and its members, discontinued selling to said Bender in the period from April 20, 1921, to August 12, 1921, for the purpose of assisting the association and its members to maintain the price agreements as described in paragraph two hereof. After said Bender, following the suggestion made to him by the said division manager that if he joined respondent association, it would help him get the shipments that had been withheld from him by said American Tobacco Company, applied to the vice president of the respondent association for membership therein, the said American Tobacco Company reinstated him as one of its customers and forwarded to him shipments that had been withheld in the period from April 20, 1921 to August 12, 1921.

Respondents John Murphy and James Murphy, partners doing business under the name and style Murphy Brothers, were expelled from the association in April, 1921, because they were accused by said association of reselling at prices lower than those fixed by the association. The American Tobacco Company, after investigating complaints made to it by the association that said Murphy Brothers were reselling its products at prices lower than those fixed by the association and its members, discontinued selling said Murphy Brothers in the period from August 25, 1921, to October 4, 1921, for the purpose of assisting the association and its members in maintaining the price which was then fixed as set out in paragraph two hereof.

For the purpose of assisting the association and its members in maintaining the price fixed by them as set out in paragraph two hereof, the American Tobacco Company in 1921, because of complaints made to it by the association and its members that respondents Furman and Blumenthal were reselling its products at prices lower than those fixed by the association and its members, withheld shipments of its products to said Furman and Blumenthal while it was investigating the prices at which Furman and Blumenthal were reselling its products.

Paragraph four The aforesaid acts and things done by said respondents and each of them had the tendency and capacity to constrain all wholesale dealers doing business in the territory above mentioned to uniformity with the aforesaid products in their dealerships at the prices fixed by the association and its members as hereinafter set out and hence to hinder and suppress all competition in the wholesaling of said products in said territory, particularly among the members of the association and further to hinder and restrict competition between all retail dealers in said territory. Said respondents' practices thus tended to unduly hinder and obstruct the free and natural flow of commerce in the channels of interstate commerce.

of Philadelphia a list of the prices which it, the Tobacco Company) "suggested" as the prices at which its products should be resold by the members of the association to other wholesalers and to the retail trade.

2. That the association adopted a schedule of fixed prices at which its members should thereafter resell to their dealer-customers the tobacco products which they dealt in, including the products of the American Tobacco Company, and it adopted a system for the maintenance and enforcement of the said resale prices.

3. That the association sought by persuasion and intimidation to cause all dealers to maintain the said resale prices.

4. That the association secured the cooperation of the American Tobacco Company in such persuasion and intimidation. It then proceeds to state what the Tobacco Company did:

(a) It notified its trade by circular letters and otherwise that it would refuse to sell its products to any wholesale dealer who failed to resell at prices fixed in the letter.

(b) When it was informed by the association that dealers in its products were failing to maintain resale prices the Tobacco Company proceeded to investigate the matter and if it found a dealer was failing to maintain prices it refused to furnish him with its products.

The conclusion which the commission reached was that the practices of the respondents described in the findings constituted unfair methods of competition in interstate commerce and violated the act of Congress which created the Federal Trade Commission and defined its powers and duties.

The order which was entered, in so far as it relates to the American Tobacco Company, and it is the sole party complaining of the order, reads as follows:

"And it is further ordered that The American Tobacco Company cease and desist from assisting and from agreeing to assist any of its dealer-customers in maintaining and enforcing in the re-sale of cigarettes and other tobacco products manufactured by the said American Tobacco Company, re-sale prices for such cigarettes and other tobacco products, fixed by any such dealer-customer by agreement, understanding or combination with any other dealer-customer of said The American Tobacco Company."

The American Tobacco Company insists that this order should be set aside on two grounds:

1. On the ground that it has never done what it is ordered to cease and desist" from doing and which it has no purpose and no desire to do.

2. For the reason that a manufacturer may under the law and with entire propriety by its conduct, advice, and, perhaps in other ways, "assist" its dealer-customers in maintaining a re-sale price for the products manufactured by it.

Section 5 of the Federal Trade Commission act, having declared unfair methods of competition in commerce" to be unlawful, em-

powered the commission to prevent the use of such methods of competition if after complaint served and a hearing it determined that such methods were being employed. In that event it authorized the commission to enter an order to "cease and desist" from such unlawful

methods of competition. The act further provides that 1416 the commission may apply to the Circuit Court of Appeals to enforce the order to "cease and desist." It also gives to any party required by such an order "cease and desist" the right to apply to the Circuit Court of Appeals to review the order. Upon such application, either by the commission or by a party affected by the order, the court is given jurisdiction to affirm, set aside, or modify the order. In pursuance of the provisions of the act the American Tobacco Company has petitioned this court to set aside the order entered by the commission on February 16, 1924, which requires it and other persons named therein to cease and desist from certain practices which the commission has adjudged to be unfair methods of competition.

The act, in section 5, gives to the commission authority to proceed in unfair competition cases only "if it shall appear to the commission that a proceeding by it in respect thereof would be of interest to the public." There does not appear in the record any "finding" that this proceeding is one "of interest to the public." The complaint, however, begins by stating that "acting in the public interest pursuant to the provisions" of the act of Congress the Federal Trade Commission charges that the parties named are using unfair methods of competition in interstate commerce in violation of the statute. We should suppose that when the hearings were concluded, and the commission stated its findings, it would expressly declare whether or not it found the proceeding had been justified as being in the public interest. *John Bene & Sons, Inc., v. Federal Trade Commission*, 295 Fed. 729; *L. B. Silver v. Federal Trade Commission*, 289 Fed. 985.

In the present proceeding it is not claimed that the ultimate consumer has been prejudiced. It is no where asserted that the price to the ultimate consumer, the purchasing public, has been raised or in any degree affected by the acts complained of and 1417 the controversy seems to be one between the jobbers and the amount of the discount they should allow the retailers. In view of the conclusion we have reached on the merits it is not important to consider whether the Federal Trade Commission has jurisdiction of such a controversy as is here involved, and we express no opinion concerning it.

The Federal Trade Commission is made by the act which creates it the fact-finding body. Its language is that "The findings of the commission as to the facts, if supported by testimony, shall be conclusive." But the ultimate determination of what constitutes unfair competition is for the court and not for the commission to decide. *Federal Trade Commission v. Gratz*, 253 U. S. 421, 427; *Federal Trade Commission v. Curtis Publishing Company*, 260 U. S. 568.

The complaint was against the Wholesale Tobacco and Cigar Dealers Association of Philadelphia, its officers, directors, and members. The officers, directors, and members of the association were also named individually in the complaint and the order to cease and desist named in like manner not only the association, its officers, directors, and members, but each of them individually by name and required them all to desist from fixing, enforcing, and maintaining and from enforcing and maintaining, by combination, agreement, or understanding among themselves, or with or among any of them, or with any other wholesaler of cigarettes or other tobacco products, resale prices for cigarettes or other tobacco products dealt in by such respondents, or any of them, or by any other wholesaler of cigarettes or other tobacco products.

But before the hearing began, although after the complaint was served, the association itself dissolved. This it did nearly two years before the order to desist was entered. The findings of fact 1418 made by the commission state that the association existed until at least June 9, 1922. But the fact that it then ceased to exist and that fact was known to the commission does not appear to have been regarded by any of the counsel who took part in the proceedings before the commission or by the commission itself as any reason for dismissing the complaint and terminating the proceedings. And Commissioner Van Fleet, who alone dissented from the action of the commission, never suggested as a ground for dissent the fact that the association itself had already ceased to function and was already formally dissolved.

The American Tobacco Company, which alone brought these proceedings into this court, does not now argue that because of the dissolution of the association the Federal Trade Commission became powerless to enter the order appealed from. On the contrary its counsel on the argument in this court asserted that the case is not a moot one, and is not one involving only an academic question. The findings of fact state that the association was "a voluntary unincorporated" body. It was therefore merely a body of persons acting together without a charter for the accomplishment of a common purpose. Such a body was not a legal entity having a distinct existence independent of its members. It had no power as such to contract, and no power to take hold or dispose of property. Everything that the members of the association did when they met together as an association they could do as well after the association was dissolved by simply meeting together and passing resolutions expressing the judgment of the meeting as to the policy which the tobacco jobbers in Philadelphia ought to pursue and the maximum discount they ought to allow to the retailers and pledging themselves to abide thereby until a similar meeting subsequently called should modify the agreement arrived at. The material fact is not what these jobbers called themselves when they met together and took such 1419 action, or whether they called themselves anything. The name they assumed signified nothing as they did not create

a legal entity. They did not bind an entity but they did bind themselves, and they were individually responsible for what they did. The association as such was responsible for nothing, and we are not impressed by the suggestion that the Federal Trade Commission lost jurisdiction of the matter involved and was without power to hear and determine the issue presented or to enter the order to cease and desist simply because the individuals complained of had ceased to function under the particular name of Wholesale Tobacco and Cigar Dealers Association of Philadelphia.

It is undoubtedly true that the complaint made by the Federal Trade Commission is the basis for the proceedings, and that the facts alleged therein, if sustained by the findings of the commission and supported by the evidence, must show unfair competition. *Federal Trade Commission v. Gratz*, 253 U. S. 421.

The order to cease and desist in terms applies to all the respondents except the Lorillard Company but the only one affected by the order who is in this court complaining of it is the American Tobacco Company. What that company is ordered to cease and desist is "from assisting and from agreeing to assist" any of its dealer-customers in maintaining and enforcing in the resale of its tobacco products resale prices for such products, "fixed by any such dealer-customer by agreement, understanding, or combination with any other dealer-customer of said The American Tobacco Company."

If this order had simply directed The American Tobacco Company to desist from assisting The Wholesale Tobacco and Cigar Dealers' Association of Philadelphia to maintain resale prices it might perhaps be objected that the question raised by the petition to revise had become moot or academic. But in view of the form in which 1420 the order was entered any such contention seems frivolous, and the petition raises a real question upon which the petitioner is entitled to have the determination of this court.

It appears that what the American Tobacco Company did, was not to enter into any price-fixing agreement with any other manufacturers as to the price of its products to the wholesalers or to the retailers or to the public. It simply would not sell to any wholesaler or jobber in the Philadelphia territory if it found that he was selling to the retailers at a price less than that fixed by the Wholesale Tobacco and Cigar Dealers' Association of Philadelphia. As we understand the record the American Tobacco Company fixed the price at which it sold its products to the wholesalers and the jobbers and did not do anything more than refuse to sell its products to any wholesaler or jobber who sold to the retail trade at a price which the Wholesalers' Association fixed as the price to be charged the retailers in order that their business as wholesalers might be carried on at a profit which would enable them to continue in business. We have read this record carefully and are constrained to hold that in pursuing the course the American Tobacco Company adopted we fail to discover anything "unfair," or "unreasonable" or in any way contrary to public policy.

The complaint is the basis for the subsequent proceedings. If, when it is properly construed, it is clearly insufficient to show unfair competition any order founded upon it must be set aside by the court. And the objection that the complaint is insufficient, although not raised before the commission, may be taken nevertheless in the court on application to set the order aside. *Federal Trade Commission v. Gratz*, 253 U. S. 421.

The object of the Wholesale Tobacco and Cigar Dealers' Association of Philadelphia as stated in its constitution was, in part "to promote uniformity in the customs and usages of the Wholesale Tobacco and Cigar Trade; * * * to correct any abuses as may exist in the conduct of the trade by its various members." The by-laws of the association provided for a board of directors and gave the board "power to appoint committees to carry into effect any of the objects of the association." The by-laws also provided that the board should appoint an executive committee to consist of five members which "shall be vested with powers to determine questions of moment, without reference to the general board except such vital questions; which in their opinion should be referred to the board.

The president of the American Tobacco Company was asked the following question:

"Did you, as directing the policy of the American Tobacco Company, ever consciously invite or cooperate in, in the making or carrying out of any agreements among jobbers or retailers that would limit their right to sell your products for what they pleased?"

He was permitted, over objection, to answer "I never have."

The vice-president of the company who had charge of its sales department was asked "did the American Tobacco Company insist upon the maintenance of a price in Philadelphia, which according to the information which you got from jobbers was prevailing in Philadelphia?" His answer was, "No, sir, we insisted on nothing." He was also asked:

"Q. Did you ever take a jobber off of a list because he sold for a lower price in a given community?"

He answered:

"Ask me a specific instance and I can answer. We never took, to my knowledge, a jobber off our list exclusively because he sold at a lower price."

1422 "Q. Although that may have been one of the reasons?"

"A. That may have been a contributing reason."

He was asked:

"Q. Did you ever adopt any system of carton marking, reports from jobbers, systematized reports from salesmen or otherwise, to detect price cutters?" His answer was "No, sir."

He was also asked:

"Q. Nor did you ever have a system of reports from jobbers or jobbers' associations or systematized reports from salesmen with respect to it?" He answered: "Not to my knowledge."

He did, however, state that the policy of the American Tobacco Company was to cease selling any customer when it thought he was injuring its business.

He apparently was in agreement with the statement of the president of the company that the tobacco business is benefitted by the merchandising to the consumer at the lowest possible price "because we sell more goods." He added "our business only begins to be endangered when either the retail dealer or the jobber does not make a living wage."

He was asked:

"Now, do you feel that if, by reason of the particular jobber selling at less than the living profit in a given community, your other jobbers in that community will become disinterested in your brands, do you feel that that would endanger your business?"

1423 His reply was:

"It not only would, but on occasions it has. It has gone so far that sometimes jobbers have ceased handling legitimate, good wholesale houses have ceased to handle tobacco and tobacco products."

"Q. And that, of course, is a thing that you do not relish!—A. We do not like that.

"Q. And you attempt to avoid that wherever it is possible to avoid it!—A. And we attempt to avoid it."

The vice-president of the Lorillard Company, one of the respondents in this original proceeding, and who was in charge of the selling end of his company's business was asked the following question:

"So far as you are aware and have any knowledge or information, did the Lorillard Company, or any of its officials, representatives or agents, have any part in the formation of any of these various tobacco associations?"

His answer was: "No, sir, not as far as I know." As against the Lorillard Company no findings of fact were made by the commission and the proceeding was dismissed as against it.

It appears that one of the jobbers who handled the products of the American Tobacco Company at Minneapolis suggested to that company that it get all the manufacturers together and agree upon some selling policy. He was informed by the vice-president of that company, who was in charge of sales, as follows:

"We have given consideration to your letter of April 6th 1424 and have not felt that it is at all possible to get co-operation as a unit from the leading tobacco manufacturers. As far as this company is concerned, as Mr. Hill wrote you, we are greatly interested in the matter and regret to see the tendency toward price cutting. We feel very definitely here that when jobbers have co-operated and have held such conferences as Mr. Hill has suggested, then the manufacturer can step in by refusing shipments or withholding orders from the demoralizers, and thereby assist those

legitimate jobbers who desire to make a profit. Where, however, a condition of general demoralization exists, we feel here that there is little we can do."

In June, 1921, the American Tobacco Company addressed to its "jobbing customers" Circular 2783 which read as follows:

"It is of the highest interest to this company to maintain permanent means of distributing its brands of tobaccos and cigarettes by efficient and business-like methods.

"We can only expect to obtain and hold customers when it is possible for jobbers to sell our products profitably.

"It is obvious that a jobber of our products who sells at prices which would not permit of the tobacco business itself being profitable, or the business on our brands being profitable taken by itself, is a jobber who in the long run will be a detriment and not a benefit to our business as our customer.

"Any jobber who sells our products without profit or with such a small profit that it will not benefit him to continue permanently in the tobacco jobbing business on such a margin of profit is not a distributor who can afford us a safe and permanent avenue of distribution, and, if by his persistent price-cutting he discourages and 1425 destroys the interest in our brands with competing jobbers we may eventually be left without adequate means of thorough distribution in his locality.

"For this reason we are convinced that for the future of our business we are bound to prevent as far as we reasonably and lawfully may such demoralization in the trade so far as our products are concerned. This does not mean price maintenance, but it does mean that where a jobber is not interested in making a fair and reasonable profit on our brands and elects to sell our products, for motives of his own, at less than a living profit, we are forced to the conclusion that he is not sufficiently interested in our goods to make a desirable permanent customer and we shall feel at liberty to remove him from our list of direct customers.

"We trust that this policy will have the approval of all customers who are concerned in making a livelihood out of the tobacco business."

That circular did not, however, differ materially from the Lorillard Company's circular addressed to its customers a month earlier and which read as follows:

"The 10% discount from our list price allowed all jobbers on our tobacco line is what we consider a fair and legitimate profit, accruing to the jobber for handling and distributing our goods.

"Long business usage has confirmed the fairness of this arrangement.

"Knowing that a reasonable profit is essential to the success of any business and that only successful jobbers are satisfactory and de-

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pendable distributors, we feel that it is good business for us 1426 to urge the jobber to sell our brands at prices that will not prove an injury to our valuable trade-marks. Where the jobber persists in disregarding our policy in such matters, it is logical for us to conclude that he is willing to sacrifice our business welfare for his own selfish interest.

"We believe you will agree with us that it would be a very short-sighted policy to continue to supply such firms with the means of demoralizing our accustomed channels of distribution.

"All orders subject to acceptance by our New York office, and if accepted will be filled at prices ruling on day of shipment.

"No representative or employee of this company has authority to change any circular, letter, or price issued by this company."

And in August of the same year the Lorillard Company issued another circular to its customers being Circular No. 1369, in which it set forth at length the circular above quoted and appended thereto the following statement:

"Since the issuance of this circular other manufacturers, we are pleased to see, have taken quite a similar action with a view to pointing out to the jobber the importance of bringing about a betterment of selling conditions existing in different sections of the country.

"We now wish to advise that any move to better selling conditions in your section will, in so far as we can properly and lawfully assist, have our hearty support and approval."

It was evidently the policy of both companies to allow the jobbers who handled their products to understand that those 1427 who sold their products at a greater discount from their list prices than would secure to the jobbers "a fair and legitimate profit" or a "fair and reasonable profit" could not be regarded as "a desirable permanent customer," and would be regarded by the manufacturer as "willing to sacrifice our business welfare for his own selfish interest."

The American Tobacco Company bluntly told its jobbers that if they were not interested in making a fair profit and for motives of their own elected to sell at less than a living profit the company would feel at liberty to remove them from the list of direct customers. The Lorillard Company made its intentions equally plain when it told its customers that "We believe you will agree with us that it would be a very short sighted policy to continue to supply such firms (those giving too great a discount) with the means of demoralizing our accustomed channels of distribution."

Because of the practice which had developed among the jobbers of selling to the retailers at a price so low as not to allow a reasonable profit, and in many cases of no profit at all, it came about that a considerable number of the jobbers who previously had been handlers exclusively of tobacco products added side lines such as

candies, groceries, chewing gum, and other things to their tobacco products. This was regarded by the tobacco manufacturers as a great detriment to their business as naturally it lessened the interest the jobbers had in the tobacco products.

The result was that in many sections of the country the tobacco jobbers were not only not making a reasonable profit but were selling their goods at an absolute loss. This naturally caused great dissatisfaction among the jobbers and led them to form local associations among themselves in the hope that they might remedy what they regarded as the evil conditions in which they were involved.

1428 The Wholesale Tobacco and Cigar Dealers' Association of Philadelphia, against which the Federal Trade Commission commenced the proceedings herein involved, was one of the associations organized for the purpose indicated.

The testimony indicated that the tobacco market in Philadelphia had the reputation of being the greatest cut price market in the United States. That in the city of New York being perhaps equally as bad. The condition in Cincinnati, while not so bad as in Philadelphia and New York, is described as "almost as bad." The testimony shows that the condition of the tobacco business throughout the United States after the close of the World War, and especially during the years 1920 and 1921, was more "demoralized" than at any previous time. This demoralization was due to the feeling which existed among the jobbers. The tobacco manufacturing companies sold to the jobbers and they in turn sold to the retailers. The manufacturers had for a great many years given to the jobbers a trade discount of ten per cent and two per cent for cash in ten days.

The attitude of the American Tobacco Company is shown in a letter written by the vice-president of the company under date of May 2, 1921, to a jobber who had written requesting the cooperation of the company in preventing so called price cutting. In the reply the vice-president wrote:

"* * * as far as this company is concerned, as Mr. Hill (the president of the company) wrote you, we are greatly interested in the matter and regret to see the tendency towards price cutting. We feel very definitely here that when jobbers have cooperated and have held such conferences as Mr. Hill has suggested then the manufacturer can step in by refusing shipments or withhold orders from the demoralizers, and thereby assist those legitimate jobbers who desire to make a profit."

1429 And on July 8, 1921, the general sales manager of the company wrote to one of its agents "not to arrange any meetings for your jobbers. You should suggest to the jobbers that it is their duty to get together themselves. We do not want to be a part of any organization whatever but we will insist upon the maintenance of the price that I suggested to you as all jobbers with whom I come

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in contact advise me that this is the prevailing price in this community."

The examiner for the Federal Trade Commission in his report upon the facts to the commission, stating what the testimony disclosed, concluded his report as set forth in the margin.*

* Paragraph five. The two respondent manufacturing companies manifested their interest in and cooperation with the Philadelphia Tobacco and Cigar Dealers Association and its members by cutting off from their direct list certain jobbers whose conduct in deviating from prices fixed by the association, in the sale of the products of the said companies, was brought to their attention. After considerable correspondence between the sales manager of the American Tobacco Company in Philadelphia and the several officers of the American Tobacco Company in New York concerning the price cutting activities of a Camden, N. J. firm of jobbers, members of the Wholesale Tobacco and Cigar Dealers Association of Philadelphia, on August 28, 1921, the said jobbers—the American Tobacco Company. The said firm sold its products at a discount of 10 per cent. of list and instead of marking on its invoices the true discount of 10 per cent. falsely marked thereon eight and seven per cent. respectively, which were the discounts allowed by the association. The said firm on one occasion attended a meeting of the association after having heard reports that were circulating among members of the association to the effect that they had been "breaking the price combination." While there they accused other members of the association of doing the same thing and considerable disturbance of a physical nature was about to occur when the meeting broke up and the said firm withdrew from the association. However, after having made proper assurance that they would desist from its so-called price cutting, the firm was reinstated on the direct buying list by the American Tobacco Company on October 4, 1921.

Paragraph six. In the latter part of the month of January, 1921, a representative of P. Lorillard Company in the Philadelphia district had a conversation with a jobber in the name of Seider and requested him to join the Philadelphia Tobacco Dealers Association—that it would be best for him. The jobber was then buying his goods from the American Tobacco Company and the P. Lorillard Company direct and had been for many years. The said jobber had also received an invitation to attend one of the meetings of the association and was also called upon by the president and treasurer of the association and requested to join the same. The president of the association also requested Seider's son to go along with the association price. A representative of the 1920 American Tobacco Company also stated to Seider that it would be better for him to join the association, that he might manage his goods if he made any more purchases. Neither Seider nor his son, who is associated with him in business, joined the association, and a month or two later his orders to the American Tobacco Company were cancelled and remained cancelled for the space of two months and his orders to the Lorillard Company were cancelled and remained cancelled for the space of six months. The American Tobacco Company refused to ship Seider any of its products from April 30 to July 12, 1921. Repeated requests to the said companies to fill his orders brought no replies from either. The last shipment received from the Lorillard Company was April 5, 1921, and the interim lasted until November 1, 1921. In the meantime, the said customer of Lorillard's was desirous to have his orders filled when he received the following letter from the company:

MAY 2, 1921.

Mr. GEORGE SEIDER,

R. R. Center 174 and 184 Sts.,
Philadelphia, Pa.

DEAR SIR: Replying to your letter of April 30, we ask that you kindly place your orders for our products with jobbers convenient to you.

Yours very truly,

ROBERT HOLLY,
Genl. Mgr.

On May 6, the Lorillard Company wrote the same jobber that they were not inclined to make further shipments direct to him and suggested that he supply his "needs" through "jobbers convenient to him." October 14, 1921, the Lorillard Company in reply to a request of Seider to be placed on the said company's direct purchasing list, and the matter had "been submitted to its sales board for its careful consideration," and that as soon as their head salesman covering Philadelphia submitted their recommendations as to his request (and he would doubtless receive a visit from them in the near future), the company upon receiving their reports, would then be in a position to advise him definitely of their decision. Seider also went to see the vice-president of the Lorillard Company in New York about getting reinstated. As above stated the said jobber was reinstated on the direct buying list of the Lorillard Company November 1, 1921. This jobber firm had been a regular purchaser of the Lorillard Company from ten to twelve years. Their credit had never been questioned. Their bills had always been paid and only after the formation of the Philadelphia Association and his failure to buy the same and abide by or follow along with the prices as fixed by it did any trouble arise between the said Lorillard Company and its said long-time customer.

The Lorillard Company was also petitioned by the jobbers for relief from the effects of the action of the association in placing the jobbers and the retailers in the same class as to the discounts allowed therein regardless of the amount of the purchase, and the remedy the representative of the Lorillard Company suggested was that if the jobbers interviewing him would move out of the Philadelphia district beyond the jurisdiction of the Philadelphia Association, the Lorillard Company would then sell him at prices which he had been accustomed to receive prior to the formation of the Tobacco Dealers Association as above said.

Paragraph seven. The general policy of the Lorillard Company was the same in 1921 towards so-called price cutters in 1920 and 1921 and towards associations of tobacco dealers organized and functioning during the said years with activities similar to the respondent association regardless of state or locality. On May 20, 1921, the Lorillard Company wrote two reputed so-called price cutters in Charleston that "there seems to

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Commissioner Van Fleet, in dissenting from the order made by the Federal Trade Commission against the American Tobacco Company, said:

"The charge is that said company conspired with the Wholesale Dealers Association to maintain prices. The association was interested in maintaining the price that its members might obtain more for their goods. The object of the American Company was not the same as the association. The American Company sold its goods upon a ten per cent discount to the members of the association and its price was in no wise affected by the cutting of dealers. Of course this did not necessarily prevent the American Company from conspiring with the association but it is a fact to be considered whether there was such conspiracy. If dealers were cutting prices and demoralizing the trade which at the time charged had proceeded to the extent of ruin if continued the American Company 1432 had a legal right to refuse to continue business dealings with such concerns. It is evident that a concern cannot stay in business if it sells at no profit as the evidence shows was the case here. The mere fact that the acts of the American Company were contemporaneous with those of the association is not determinative."

In the case now before us it appears that the American Tobacco Company sold its products to the jobbers outright and without any express agreement with them as to the price at which they would sell to the retailers, or any agreement as to the price to be ultimately charged the consumers. The American Tobacco Company was convinced, however, that its business was seriously affected and endangered if certain of its jobbers in a particular locality, such as Philadelphia, for any reason undertook to sell its products at less than "a living profit." The effect of such practices occasioned great dissatisfaction on the part of other jobbers in that particular community causing them to become disinterested in the brands manufactured by the American Tobacco Company and causing some of the jobbers to cease handling the products of the company. As the jobber was the channel for the delivery of the company's products to the retail trade it did not like and sought to avoid the dissatisfaction to its jobbers in a given community by the cutting of prices below "a living profit" to its other jobbers in the community. The testimony

be a general movement throughout the country on the part of the jobbers—and we have recently been advised it has extended to Cincinnati—to secure a fair margin of profit for handling tobacco products—and the said respondent company requested the so-called price cutters to "cooperate with the movement on its line of merchandise." It was also part of the duty of the company's agents to report price cutters to the proper head officials occurring in the district of which the said agent had jurisdiction and frequently competitor jobbers did likewise. Under these circumstances the rule of the Lorillard Company was to write to the offending jobber and request him to cease price cutting, furnishing him with one of the circulars heretofore referred to. On August 24, 1921, a jobber reported a competitor at La Crosse, Wisconsin, for so-called price cutting, requesting that means be taken to prevent the same. The Lorillard Company replied to the complainant that they "have been working on the subject matter of his complaint of August 24th for the past ten days and are pleased to advise that the parties referred to will, commencing this day, sell our products on a basis that will show a legitimate profit" and further stated that Wisconsin had been "slow in lining up." Operating in this way, so-called price cutters were brought back in line and from June 1 to December 31, 1921, not more than 15 or 20 so-called price cutters were dropped from the direct purchasing list of the Lorillard Company.

shows that the Lorillard Company had a like feeling towards such of its jobbers as engaged in similar practices, and that for exactly similar reasons it sought to avoid the like consequences. This is shown by the testimony of the vice-president of the Lorillard Company who was principally charged with looking after "the selling end of the business." He testified as follows:

"Q. Did the Lorillard Company seek to get its jobber customers to sell its products at such a price as would enable the jobber customers to pay their bills and to prevent the demoralization in the tobacco business?—A. They did."

He further testified as follows:

"Q. Do you know of your own personal knowledge of any facts showing, or tending to show, in your judgment, any dealings of any kind by the Lorillard Company or any of its officers or agents with reference to the various tobacco associations above mentioned?—A. Not to my knowledge. * * *

"Q. Has the Lorillard Company ever had any agreement with any of its jobber customers as to resale prices of its products?—A. Not to my knowledge.

"Q. Did the P. Lorillard Company at any time, in any manner, ever attempt to dictate to its customers the resale price of its goods?—A. Not to my knowledge."

And then after saying that the circulars issued by the company were made the subject of conversation with its field managers he stated:

"Q. What was the general drift of the verbal conversations?—A. The men were instructed that the circular meant practically what it said, and that if they were called upon to discuss that circular, we put particular stress on two things, and if these instructions were not followed it was because the men totally violated them. One was that after talking with the jobber, if this question was raised, to have it clearly understood that there was no agree-

1444 [1434] ment, we asked him to agree to nothing; and the other was that under no circumstances he should connive or conspire with any other jobber to injure his competitor. Those two features were brought out very specifically in every interview that we had with the men."

It is not alleged and it no where appears that the American Tobacco Company entered into any agreement with other manufacturers fixing the price at which it would sell its products to wholesalers, jobbers, or retailers. It at no time fixed the price at which retailers were to sell its products to consumers. The policy of the wholesalers and jobbers was to fix a uniform price at which they would sell to the retailers, and they agreed to allow a certain trade discount of 7 or 8 per cent as the case might be from the manufacturers' list prices. And what the American Tobacco Company did was to refuse to sell its products to wholesalers or jobbers who, having bought its products at a price fixed by it, thereafter sold them

to the retailers at a greater trade discount than the Wholesalers' Association had agreed upon. In other words its policy was to uphold and support the prices of its products as fixed in a particular locality by the wholesalers or jobbers therein. The facts show that where wholesalers allowed a greater discount than that which they themselves in their association had agreed upon the business in the particular locality was demoralized and they were deprived of a fair and legitimate profit. To protect its own interests and enable the jobbers to make a reasonable profit it simply refused to sell to jobbers who sold to the retailers with a greater discount than the Wholesalers' Association had approved. We see nothing unlawful in the policy which the American Tobacco Company pursued. We can not see that in what it did it engaged in unfair competition within the meaning of the Federal Trade Commission act as that act has been construed by the courts.

1445 [1435] We shall now refer to the decisions. In 1911 the

Supreme Court decided *Dr. Miles Medical Company v. John D. Park & Sons Company*, 220 U. S. 373. It was held that a system of interlocking restrictions by which a manufacturer of proprietary medicines attempted by contracts to control not only the prices at which its agents could sell its products, but the prices for all sales by all dealers at wholesale or retail whether purchasers or subpurchasers should pay amounted to a restraint of trade, both under the Sherman Anti-trust Act and at the common law. All competition between retailers was destroyed as each was required to bind himself by contract not to sell at less than the standard price.

In that case the court had before it express contracts which the manufacturer made with wholesalers by which the manufacturer sought to control the prices at which its products should be sold by the wholesalers and to restrict the right of the wholesalers to sell only permitting sales to be made to those who had been licensed to buy by the manufacturer, and who agreed not to sell below a minimum price dictated by the manufacturer. In that case, Mr. Justice Hughes, writing for the court, declared: "Whatever right the manufacturer may have to project his control beyond his own sales must depend, not upon an inherent power incident to production and original ownership, but upon agreement." He then went on to point out that an agreement in restraint of trade was illegal under the common law unless it was found to be reasonable both with respect to the public and to the parties and limited to what was fairly necessary in the circumstances of the particular case, for the protection of the covenantee. "Otherwise," said the court, "restraints of trade are void as against public policy." It was observed that the agreements before the court were designed to maintain prices, "after the complainant has parted with the title to the articles,

1446 [1436] and to prevent competition among those who trade in them." Again it was said:

"If there be an advantage to a manufacturer in the maintenance of fixed retail prices, the question remains whether it is one which he

is entitled to secure by agreements restricting the freedom of trade on the part of dealers who own what they sell. As to this, the complainant can fare no better with its plan of identical contracts than could the dealers themselves if they formed a combination and endeavored to establish the same restrictions, and thus to achieve the same result, by agreement with each other. If the immediate advantages they would thus obtain would not be sufficient to sustain such a direct agreement, the asserted ulterior benefit to the complainant cannot be regarded as sufficient to support its system.

"But agreements or combinations between dealers, having for their sole purpose the destruction of competition and the fixing of prices, are injurious to the public interest and void. They are not saved by the advantages which the participants expect to derive from the enhanced price to the consumer."

The court further said:

"The complainant having sold its product at prices satisfactory to itself, the public is entitled to whatever advantage may be derived from competition in the subsequent traffic."

The facts of that case are clearly distinguishable from the facts in this. In that case the attempt was to control the prices charged by retailers to consumers, and to prevent wholesalers from selling to retailers who sold the goods below the minimum price fixed by the manufacturer. In this case the most that can be claimed is that the company has sought to maintain a uniform price on its products until they reach the hands of the retailers. The retailers are free to sell to consumers at any price they see fit. It does not appear that the American Tobacco Company has concerned itself with the prices at which its goods are sold by retailers to consumers.

In 1911 the Supreme Court also decided *The Standard Oil Company of New Jersey v. United States*, 221 U. S. 1, in which it announced through Chief Justice White that the Sherman Act should be construed in the light of reason and so construed that it prohibited all contracts and combinations which amount to an unreasonable or undue restraint of trade in interstate commerce. So construed the court held the Standard Oil Company, as it then existed, constituted an unreasonable and undue restraint of trade. A few weeks later the court decided *United States v. American Tobacco Co.*, 221 U. S. 106, in which it reaffirmed the rule announced in the Standard Oil case and declared that the American Tobacco Company was a combination in restraint of trade and an attempt to monopolize the tobacco business in interstate commerce within the prohibitions of the Sherman Act. The dissolution of the American Tobacco Company was decreed and the court below was directed to work out a plan for the recreation of the company in harmony with law.

In the proceeding now before the court the American Tobacco Company is not charged with being a combination in restraint of trade and therefore illegally existing, but it is charged with carry-

ing on its business in a manner which constitutes "unfair methods of competition" under the Federal Trade Commission act of September 26, 1914. 38 Stat. c. 311, p. 717. Neither the 1448 [1438] Standard Oil case nor the American Tobacco case have therefore any application to the facts herein involved. There is nothing in the record to show that in the present case the American Tobacco Company is seeking to monopolize commerce in tobacco by entering into agreements with other manufacturers of tobacco products or with tobacco growers.

In 1919 the Supreme Court decided *United States v. Colgate & Co.*, 250 U. S. 300. The court declared that the purpose of the Sherman Act was to preserve the right of freedom to trade. "In the absence of any purpose to create or maintain a monopoly, the act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal. And, of course, he may announce in advance the circumstances under which he will refuse to sell." The court has had occasion in a number of subsequent cases to point out that this case has been misunderstood by the profession, and it has explained if not what the case means what it does not mean.

It is enough for the present purpose to say that there is nothing in that decision to sustain the action taken by the Federal Trade Commission in the case now before the court. There is nothing in the record that we can find that indicates any purpose "to create or maintain a monopoly." That its business is an entirely private business will be conceded. Whether it has improperly exercised its own independent discretion as to the parties with whom it will deal and so been guilty of "unfair competition" within the meaning of the Federal Trade Commission act is a question we must determine.

In 1920 the court decided *Federal Trade Commission v. Gratz*, 253 U. S. 421, in which it affirmed the decision of this court in 258 Fed. 314, which reversed an order made by the commission. The facts relied upon as showing unfair competition 1449 [1439] were that the respondents, for more than a year, had refused to sell steel ties, manufactured by another concern and which were used to wrap bales of cotton, unless the prospective purchaser would also buy from them the bagging to be used with the number of ties proposed to be bought. This the court declared did not constitute unfair competition.

In considering the meaning of the words "unfair method of competition" the court held they "are clearly inapplicable to practices never heretofore regarded as opposed to good morals because characterized by deception, bad faith, fraud, or oppression, or as against public policy because of their dangerous tendency unduly to hinder competition or create a monopoly. The act was certainly not intended to fetter free and fair competition as commonly understood and practiced by honorable opponents in trade."

The pertinency of the Gratz case to the case now before the court lies in the fact that we have been unable to discern in this record that what the American Tobacco Company has done constitute practices which have heretofore been regarded "as opposed to good morals because characterized by deception, bad faith, fraud, or oppression, or as against public policy because of their dangerous tendency unduly to hinder competition or create a monopoly."

In 1921 the court decided *Frey & Son, Inc. v. Cudahy Packing Co.*, 256 U. S. 208. The action was brought under the Sherman Act to recover triple damages on the ground that defendant was engaged in a combination in restraint of trade. The facts, as they were stated in the opinion of the Circuit Court of Appeals for the Fourth Circuit, 261 Fed. 66, are as follows:

"The defendant manufactured and sold Old Dutch Cleanser, and developed a large trade in that article by extensive advertisements in newspapers and magazines. Considering the maintenance of a fixed price necessary to an adequate profit, defendant adopted the following means of promoting sales and maintaining the wholesale price: It sold only to jobbers and wholesalers who were expected to sell only to retailers. Soliciting agents were sent to retail merchants, and orders taken from them at the list price, to be transmitted to any jobber that the retailer named of the jobbers to whom the defendant was selling. These jobbers selected by defendant, though called distributing agents, were purchasers to whom defendant sold at a fixed deduction or discount from the list price. This discount was intended as the jobber's profit. By circulars and personal interviews jobbers were insistently exhorted to maintain the fixed prices."

The trial court charged:

"I can only say to you that if you shall find that the defendant indicated a sales plan to the wholesalers and jobbers, which plan fixed the price below which the wholesalers and jobbers were not to sell to retailers, and you find defendant called this particular feature of this plan to their attention on very many different occasions, and you find the great majority of them not only expressing no dissent from such plan, but actually cooperating in carrying it out by themselves selling at the prices named, you may reasonably find from such fact that there was an agreement or combination forbidden by the Sherman Anti-Trust Act."

The Supreme Court held the instruction was erroneous and that the recited facts, standing alone, did not suffice to establish an agreement or combination forbidden by the Sherman Act. The Federal Trade Commission act was not involved, and the question of unfair competition was not before the court. The question was whether the facts disclosed a combination in restraint of trade.

In 1922 the court decided *Federal Trade Commission v. Sinclair Refining Co.*, 261 U. S. 463, and affirmed the judgments of the courts

below reversing in four cases the orders entered by the Federal Trade Commission. The practice complained of was that a manufacturer of gasoline leased underground tanks with pumps to retail dealers at nominal rentals and upon condition that the equipment was to be used with gasoline supplied by the lessor. This, it was held, did not constitute unfair competition within the Federal Trade Commission act. The case sheds no particular light upon the question herein involved except that it is important because the court again took occasion to say that the practice was not opposed to good morals, because characterized by deception, bad faith, fraud, or oppression, and cited the Gratz case. And the court said:

"The powers of the commission are limited by the statutes. It has no general authority to compel competitors to a common level, to interfere with ordinary business methods or to prescribe arbitrary standards for those engaged in the conflict for advantage called competition."

It added that:

"It is essential that those who adventure their time, skill, and capital should have large freedom of action in the conduct of their own affairs."

In the same year, 1922, the court decided Federal Trade Commission v. Beech-Nut Packing Company, 257 U. S. 441. 1452 [1442] This case had to do with an attempt on the part of the manufacturer to compel the purchasers of its products to agree to maintain and keep standard resale prices fixed and determined by the company. The company made it known to jobbers, wholesalers, and retailers that it insisted that they should sell its products at the resale prices fixed by it, and refused to sell to any not maintaining such prices. It not only refused to sell to its customers who failed to maintain such prices but it refused to sell to others who sold to those who did not maintain such prices. In its opinion in this case, after referring to some of the prior cases the court said:

"By these decisions it is settled that in prosecutions under the Sherman Act a trader is not guilty of violating its terms who simply refuses to sell to others, and he may withhold his goods from those who will not sell them at the prices which he fixes for their resale. He may not, consistently with the act, go beyond the exercise of this right, and by contracts or combinations, express or implied, unduly hinder or obstruct the free and natural flow of commerce in the channels of interstate trade."

The question in the case arose under the Federal Trade Commission act which declares unlawful "unfair methods of competition." The court reasserted what was said in the Gratz case as to the meaning of the words "unfair methods of competition."

It then considered the facts disclosed by the record, saying:

"From this course of conduct a court may infer, indeed can not escape the conclusion, that competition among retail distributors is practically suppressed; for all who would deal in the company's products are constrained to sell at the 1453 [1443] suggested prices. Jobbers and wholesale dealers who would supply the trade may not get the goods of the company, if they sell to those who do not observe the prices indicated or who are on the company's list of undesirables, until they are restored to favor by satisfactory assurances of future compliance with the company's schedules of resale prices. Nor is the inference overcome by the conclusion stated in the commission's findings that the merchandise conduct of the company does not constitute a contract or contracts whereby resale prices are fixed, maintained, or enforced. The specific facts found show suppression of the freedom of competition by methods in which the company secures the cooperation of its distributors and customers, which are quite as effective as agreement express or implied intended to accomplish the same purpose. By these methods the company, although selling its products at prices satisfactory to it, is enabled to prevent competition in their subsequent disposition by preventing all who do not sell at resale prices fixed by it from obtaining its goods.

"Under the facts established we have no doubt of the authority and power of the commission to order a discontinuance of practices in trading such as are embodied in the system of the Beech-Nut Company."

Justices Holmes, McKenna, McReynolds, and Brandeis dissented. Justice Holmes said:

"The ground on which the respondent is held guilty is that its conduct has a dangerous tendency unduly to hinder competition or to create monopoly. It is enough to say that this I can not understand. So far as the Sherman Act is concerned I had 1454 [1444] supposed that its policy was aimed against attempts to create a monopoly in the doors of the condemned as or to hinder competition with them. Of course there can be nothing of that sort here. The respondent already has the monopoly of its own goods with the full assent of the law and no one can compete with it with regard to those goods, which are the only ones concerned."

Justices McKenna and Brandeis concurred in the opinion of Justice Holmes.

Justice McReynolds filed a separate dissent in the course of which he said:

"There is no question of monopoly. Acting alone, respondent certainly had the clear right freely to select its customers. To refuse to deal when and as it saw fit—and to announce that future sales would be limited to those whose conduct met with its approval."

The Beech-Nut case differs radically from the instant case, in which as before remarked no attempt is made by the American

Tobacco Company to compel retail dealers in its products to maintain a price fixed by it in a resale to consumers.

In 1924 the court decided *Federal Trade Commission v. Raymond Bros. Clark Co.*, 263 U. S. 565. It affirmed the order of the lower courts which vacated and set aside an order of the Federal Trade Commission. The Supreme Court reasserted the long recognized right of a trader engaged in an entirely private business freely to exercise his own independent discretion as to parties with whom he will deal. The Raymond Company declined to do business with the Snider Company unless that company discontinued its business with a certain other company engaged in a similar business. This

it was claimed unduly hindered competition in trade 1455 [1445] and amounted to "unfair competition." The court

held that a wholesaler has a right to stop dealing with a manufacturer "for reasons sufficient to himself." It was pointed out that a different case would have been presented if the Raymond Company

"had combined and agreed with other wholesale dealers that none would trade with any manufacturer who sold to other wholesale dealers competing with themselves, or to retail dealers competing with their customers."

The question here is not whether what has been done by the American Tobacco Company constituted a restraint of interstate commerce contrary to the Sherman law and therefore unlawful. The Federal Trade Commission is not clothed with jurisdiction to hear and determine that question in this proceeding, although clothed with a limited jurisdiction as respects alleged violations of antitrust acts, sections 6-10 of the Federal Trade Commission act. Its authority to make the order which it entered herein is restricted to matters of "unfair competition." The commission is not a court, and only exercises administrative power within the provisions of the statute. See our opinion in *Eastman Kodak Co. v. Federal Trade Commission*, recently decided and not yet reported. The examination of the testimony convinces us that what the American Tobacco Company is shown to have done is so far removed from constituting an unfair method of trade that it actually tended to promote fairness of trade and the suppression of unfairness in competition. Practices cannot be regarded as fair which work the demoralization of the business, and practices cannot be regarded as unfair methods of competition if a manufacturer declines to sell to wholesalers who demoralize the legitimate market by selling at a price which those in the business regard as insufficient 1456 [1446] to enable the business to be conducted with reasonable profit. The American Tobacco Company was, in our opinion, within its rights in declaring that it would not sell to jobbers who made it a practice to sell to retailers at a price which made it impossible for the jobbers to carry on their business at a reasonable profit and worked the demoralization of the trade. In holding that

the Federal Trade Commission act was intended to prevent what the American Tobacco Company did we are clearly of opinion that the commission has misapprehended the intent of the act.

In an earlier part of this opinion attention was called to the dissent filed by Commissioner Van Fleet and to his statement therein that in his opinion the American Tobacco Company had a legal right to refuse to do business with wholesalers or jobbers who were cutting prices to retailers and thereby "demoralizing the trade which at the time charged had proceeded to the extent of ruin if continued." In that opinion we fully concur—unless the American Tobacco Company had entered into a combination or conspiracy with the Wholesale Dealers' Association and the other defendants named to maintain certain prices agreed upon between them. He did not think the evidence before the Federal Trade Commission was sufficient to establish such a conspiracy. In his dissent, referring to this phase of the matter, he said:

"Of course, conspiracy is often incapable of direct proof, but when resort is had to circumstantial evidence, as in this case, the proof should rise above the dignity of mere suspicion. Some of the evidence relied upon to sustain the order hardly ever rises to that dignity. Without summarizing the evidence to my mind it appears that the truth is that the American Company had nothing to do with the organization of nor conduct of the association, and I know of no proof to the contrary. Also I believe its acts were taken independently of the association, and no real proof to the contrary appears. The commission dismissed the case against Lorillard Company for lack of proof, and I believe that, eliminating evidence of acts of others for which the American Company was in no wise responsible and discarding mere conjecture, there is not proof to warrant an order against the American Company."

It must suffice now to say that we are entirely in accord with the conclusion at which he arrived, and we are of opinion that there is no proof which warrants the order which the commission entered.

Judge Hand concurs in the result on the ground that by the dissolution of the association the controversy became moot.

The order is set aside in so far as it affects the American Tobacco Company, the sole petitioner.

1458 [1448] At a stated term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the court rooms in the post office building in the city of New York, on the 27th day of October, one thousand nine hundred and twenty five. Present: Hon. Henry Wade Rogers, Hon. Martin T. Manton, Hon. Learned Hand, circuit judges.

AMERICAN TOBACCO COMPANY, PETITIONER

v.

FEDERAL TRADE COMMISSION, RESPONDENT

Petition to review order of the Federal Trade Commission

This cause came on to be heard on the transcript of record from the Federal Trade Commission, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said commission be and it hereby is set aside in so far as it affects the American Tobacco Company.

H. W. R.

M. T. M.

1459 [1449] UNITED STATES CIRCUIT COURT OF APPEALS, Second Circuit. American Tobacco Company v. Federal Trade Commission. Order. United States Circuit Court of Appeals, Second Circuit. Filed October 27, 1925. William Parkin, clerk.

1460 [1450] UNITED STATES OF AMERICA,

Southern District of New York, ss:

I, William Parkin, clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1-84 and 1-1459, inclusive (in 2 vols.), contain a true and complete transcript of the record and proceedings had in said court in the case of American Tobacco Company, petitioner, against Federal Trade Commission, respondent, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New York in the Southern District of New York, in the Second Circuit, the 12th day of January, in the year of our Lord one thousand nine hundred and twenty-six, and of the independence of the said United States the one hundred and fiftieth.

[SEAL.]

(Signed)

WM. PARKIN, Clerk.



1474

SUPREME COURT OF THE UNITED STATES

Order allowing certiorari.

Filed March 8, 1926

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

MARCH 8, 1926.

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FILED

FEB 25 1926

No.

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WM. R. STANSEN

CLERK

IN THE
Supreme Court of the United States,

OCTOBER TERM, 1925.

FEDERAL TRADE COMMISSION,

Petitioner,

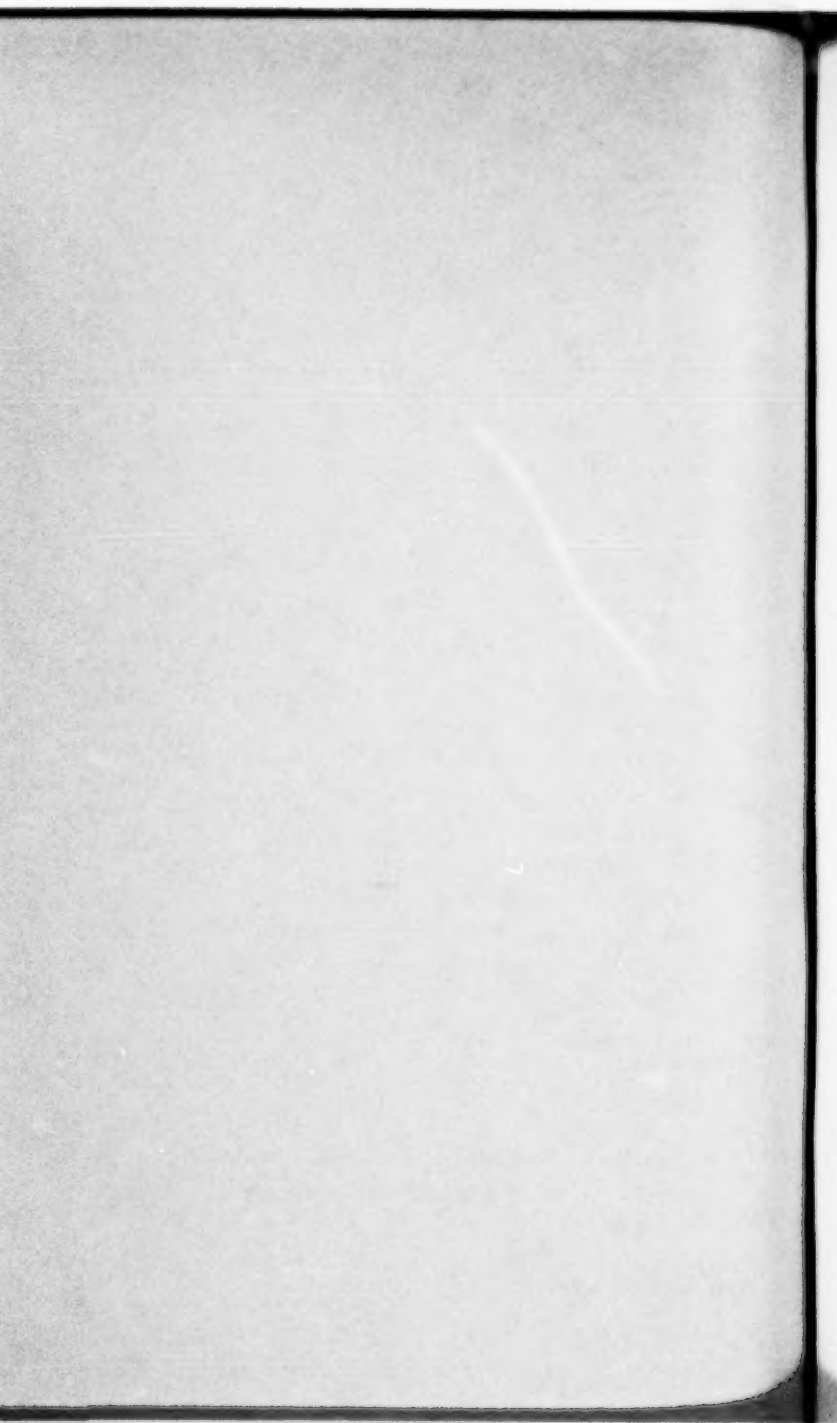
—against—

THE AMERICAN TOBACCO COMPANY,

Respondent.

**MEMORANDUM OF THE AMERICAN TOBACCO
COMPANY IN OPPOSITION TO APPLICA-
TION FOR WRIT OF CERTIORARI.**

JUNIUS PARKER,
JONATHAN H. HOLMES,
Of Counsel for The American Tobacco Company.



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IN THE
Supreme Court of the United States,
OCTOBER TERM, 1925.

FEDERAL TRADE COMMISSION,

Petitioner,

—against—

THE AMERICAN TOBACCO COMPANY,

Respondent.

**MEMORANDUM OF THE AMERICAN TOBACCO
COMPANY IN OPPOSITION TO APPLICA-
TION FOR WRIT OF CERTIORARI.**

The Petitioners have not brought themselves within Rule XXXV. So far from its being important, we assert that this case is in very truth trivial.

We maintain this because——.

First, two of the statements in the opinion of Circuit Judge Rogers that Petitioner complains of (1) that the Commission has no jurisdiction to enforce the Sherman Law; and (2) that there must be a finding that the public interest is involved—are simply *obiter dicta*. (The former question is now before this Court in the *Kodak* case, *post*.)

Second, "The *Beechnut* case differs radically from the instant case."

Third, no human being nor any artificial entity was ever injured by anything complained of.

Fourth, the "Findings" of the Commission show the alleged "activities" had ceased in 1922, several months before the Federal Trade Commission even held its first hearing and the uncontroverted proof is that they had ceased before any complaint by the Federal Trade Commission was filed.

Fifth, precisely similar facts that are made the basis of suspicion against The American Tobacco Company,—involving the same conduct to, or relations with, the same individuals,—were put on the record with reference to P. Lorillard Company, another manufacturer, also a respondent before the Commission, but the Commission dismissed the case against it.

And, finally, Judge Rogers and his associate—sustaining *verbatim* the conclusion set forth in the dissenting opinion of Commissioner Van Fleet—held that this respondent's "acts were taken independently of the association and no real proof to the contrary appears. . . . Eliminating evidence of acts of others for which The American Tobacco Company was in no wise responsible, and discarding mere conjecture, there is no proof to warrant an order against The American Tobacco Company" and all the rest is *dicta*.

Statement.

We cannot accept "the facts" as outlined in the petition as a full and unbiased statement of the case. According to our conception, it is only questions of fact that are seriously in dispute, and therefore it is hardly possible, as it might be in a case where questions of law

are principally involved, to make a statement that can be agreed upon by both parties. Furthermore, it is difficult to state the case briefly, but we shall try to state it fairly, and as briefly as possible, indicating the matters that are in dispute.

The Federal Trade Commission charges that the "acts and things done by the respondents and by each of them constituted unfair competition" (Complaint, R., p. 17, fol. 49). The complaint is based entirely on the theory that The American Tobacco Company entered into a conspiracy with an association of wholesale tobacco dealers in Philadelphia—called jobbers—to carry on price fixing activities which were unfair, in the methods of competition employed, to other jobbers *in and around Philadelphia* (Complaint, R., pp. 6-18).

There is nothing in the complaint or findings (R., pp. 1340-1357) that bases this proceeding on a theory that anything The American Tobacco Company did *independently* of the "Wholesale Tobacco and Cigar Dealers Association of Philadelphia, Pennsylvania", was violative of the Federal Trade Commission Act, or any other statute as to which the Federal Trade Commission has jurisdiction.

The order to "cease and desist", so far as it applies to The American Tobacco Company, is an order to cease and desist "from assisting and from agreeing to assist any of its dealer-customers in maintaining and enforcing, in the resale of cigarettes and other tobacco products manufactured by the said The American Tobacco Company, resale prices of such cigarettes and other tobacco products fixed by such dealer-customers, or agreement, understanding or combination with any other dealer-customer of said The American Tobacco Company" (Order, R., fols. 4081-3).

Facts.

After the World War ruinously low prices became prevalent among tobacco jobbers generally and such jobbers in a dozen or a score of cities formed associations—whether they were legal or illegal does not concern us here—for the purpose of protecting themselves from business disaster. Of course tobacco jobbers long before 1921 had frequently complained bitterly to manufacturers of excessive competition in the matter of low prices made by their competitors. But all this does not sustain the statement that “negotiations” were entered into by the association with large tobacco companies or that “dealers who would not maintain agreed prices were reported to The American Tobacco Company who discontinued sales to them”, as stated in the petition (p. 4).

The Philadelphia association was “organized in the year 1920 and existed until at least June 9, 1922” (Finding of the Commission, R., p. 1344, fol. 4032).

The “finding” is not that The American Tobacco Company induced the formation of the association; the “finding” is that The American Tobacco Company (and P. Lorillard Company against whom the Commission dismissed its complaint) was used after the organization of the association, as an instrument of the association (R., p. 1352, fol. 4055 *et seq.*).

No charge is made that the two manufacturers were in conspiracy between themselves or that any agreement was made by them or by any one else regarding manufacturer's prices.

The method employed in the attempt to prove that The American Tobacco Company was acting as a tool of the Association is to show that it temporarily discon-

tinued shipments to two of its Philadelphia customers, Murphy Bros. and Charles Seider, and that apparently there was some delay in shipments to two other customers, or rather that such customers complained to The American Tobacco Company's salesman that there was some such delay (R., pp. 697-8).

Without going into detail, we may say, what is obvious, that the tendency is for an excessively low price-making jobber to enlarge his business at a slender margin of profit, or no profit at all—hence the question of credit is closely interwoven with the question of price-cutting.

The President of The American Tobacco Company testified that Murphy Bros. were "cut off" (that is their orders for a time were not filled) for "*credit reasons*" in 1921 (R., fol. 2301), but this was nothing unusual because they had been "off the list" two or three times for credit reasons in the two or three years preceding (R., fol. 2305). They carried such a considerable stock that Mr. James Murphy did not know they "had been dropped from the list of The American Tobacco Company", on that occasion in 1921, until he heard of it on this hearing (R., fol. 1460). They were off the direct list only one month, from September 2, 1921 to October 4, 1921 (R., pp. 418, 419). (The Commission "finds" that Murphy Bros. were discontinued by The American Tobacco Company because of the prices they made) (R., fols. 4061-8).

On or before May 6, 1921, P. Lorillard Company had been holding Murphy Bros. orders for credit reasons (Ex. No. 1, Lor., R., p. 1299).

A jobber named Charles Seider, in Philadelphia, who was primarily a cigar manufacturer, increased his business in 1921 twelve-fold in the P. Lorillard Company

goods and The American Tobacco Company goods by selling "the bulk" of the goods at 10% off the list price. His cost was 10% off the list price, less a cash discount of 2% (R., fols. 1685, 1692-1699). He had previously done a small tobacco jobbing business along with his business of manufacturing cigars. He was off The American Tobacco Company's list about *two months* (R., fols. 1648-50).

He was off the list of the P. Lorillard Company for *six months* (R., fols. 1651-2).

If these two incidents (relative to Murphy Bros. and to Charles Seider) were not significant against the P. Lorillard Company, how are they sufficient to condemn The American Tobacco Company?

It seems that a jobber in Philadelphia named Blumenthal and another jobber in Philadelphia named Fermani were delayed once in getting their shipments. Very vague evidence of this is contained in the testimony of Mr. O'Boyle, a former salesman of The American Tobacco Company, employed in Philadelphia, who says only that both of these dealers complained of delay in getting their shipments (R., fols. 2089-94). After complaint to Mr. O'Boyle apparently shipments went forward at once (R., fol. 2093). We are at a loss to know where counsel get authority for the statement that "shipments to V. Fermani and one Blumenthal, other price cutters were also held up by The American Tobacco Company because of reports made to it by officers of the Association upon information furnished by their investigator". That is mere conjecture—and mistaken conjecture at that. We know of no evidence to support it, and incidentally we know that it is not so.

Respondent's Interest Not Same as Jobbers' Interest.

It is true that the low price epidemic reacted upon the jobbers so that they formed associations to try to remedy the unprofitable situation. It is clear that aggressive selling below the normal prevailing prices, involving as it does credit and over extension of jobbers accounts and demoralization in the regular channels of trade, becomes a matter of concern to the manufacturer, but it does not become so until a long time after it has become a matter of concern to the jobbers. Although the Philadelphia association was formed in 1920, the temporary discontinuance of shipments by The American Tobacco Company and by P. Lorillard Company to Murphy Bros. and Charles Seider did not take place until the spring or summer of 1921 (R., vols. 1816-17, and vols. 2301-2305); and The American Tobacco Company's general circular that the Federal Trade Commission complains about, but does not of itself condemn (except it is said that something in the nature of a threat was there "implied . . . in veiled language"), was not issued until June 29, 1921 (Com. Ex. 10, R., p. 1241).

The jobbers' association then existed in and before 1921, and complaints were received from jobbers, as they always have been received, of the conduct of the jobbers' competitors. The American Tobacco Company, to protect its own interest during the time this association existed (as before and since), found it desirable to discontinue for the time being shipments to two of its customers for reasons that could not be considered without relation to the credit conditions.

It is on this coincidence, trivial as it is, that this case is based. The incidents on which the case against the P. Lorillard Company was based were the same.

Specifications of Error.

Let us come now to the specifications of error, if they may be called such, set forth on pages 5 to 7 of the petition, for a writ of certiorari, designated as "Questions presented" "Paragraph One" to "Paragraph Eight" inclusive.

We submit that "Paragraph One" is the only question presented, requiring serious consideration. We will take it up later.

"Paragraph Two" begs the question until "One" is decided in the Commission's favor, because it assumes that The American Tobacco Company actually did abet an illegal agreement. We submit that the Court did not hold that such abetting was lawful; on the other hand it expressly found that there was no evidence of any such abetting. Mr. Commissioner Van Fleet said, in his dissenting opinion:

"I believe its (The American Tobacco Company) acts were taken independently of the Association and no real proof to the contrary appears."

The Court below, after citing the above sentence, together with other matter from the opinion of Mr. Commissioner Van Fleet, said:

"It must suffice now to say that we are entirely in accord with the conclusion that he arrived at, and we are of the opinion that there is no proof which warrants the order which the Commission entered" (Opinion, R., fol. 1457 [1447]).*

*Reference is to printed transcript of Opinion in record. Petitioner has begun transcript of Opinion in record with folio 1 instead of following folio 4218 (the last folio) of record below. The double folio numbers following 1434 are so in the transcript.

We are not here called upon to discuss "Paragraph Two" at length because it becomes important only when this Court decides it desires to sift and weigh the facts, and if it so decides, we will be content to take up paragraph "Two" when the case is presented on its merits as to the law and facts.

"Paragraph Three" is entirely irrelevant. The association of jobbers and the members of that association did not appeal to the Circuit Court of Appeals. Their practises were not in question before the Court. The Court made no determination as to whether their activities were legal or illegal, but the Court found, as above indicated, that there was no evidence to sustain the allegation that the American Tobacco Company cooperated or conspired with them.

"Paragraph Four" assumes this respondent did "join with a jobbers' association". We assert that the Court found that The American Tobacco Company kept aloof from this jobbers' association.

"Paragraph Five". We assert that the Court held nothing as to what was fair competition "for jobbers" as the jobbers were not before the Court, and this respondent was found by the Circuit Court of Appeals to have acted independently of them.

"Paragraph Six". We believe that it is self-evident that the same facts may involve a violation of the Sherman Law and constitute unfair competition, and we believe it is self-evident that there may be a violation of the Sherman Law—for example, a monopoly arrived at by the combination of all competitors—which might be satisfactory and beneficial to all the competitors, and which therefore would not constitute unfair competition, but would be a violation of the Sherman Law.

We submit that the jurisdiction of the Federal Trade Commission is dependent upon the existence of a state of facts which connotes unfair competition, and when those are proved it is unimportant whether they constitute a violation of the Sherman Law or any other law; and if those facts do not constitute unfair competition, the fact that they violate the Sherman Law is immaterial. That is to say, a showing of violating the Sherman Law is not conclusive one way or the other. We have seen fit to make the foregoing observations notwithstanding the fact that in this case, and as to this respondent, the question is academic, as the statements of the Court were *obiter*, because, there being as a fact no evidence of conspiracy or combination between this respondent and the jobbers, there was no conceivable breach of the Sherman Law by this respondent.

"Paragraph Seven" we need not concern ourselves with, as it relates to judicial comment that is professedly merely comment. The comment was as follows:

"The Act in Section 5 gives to the Commission authority to proceed in unfair competition cases only 'if it shall appear to the Commission that a proceeding by it in respect thereof would be of interest to the public'. There does not appear in the record any 'findings' that this proceeding is one 'of interest to the public'. The complaint, however, begins by stating that 'acting in the public interest pursuant to the provisions' of the Act of Congress the Federal Trade Commission charges that the parties named are using unfair methods of competition in interstate commerce in violation of the Statute. We should suppose that when the hearings were concluded, and the Com-

mission stated its Findings, it would expressly declare whether or not it found the proceeding had been justified as being in the public interest." *John Bene & Sons, Inc. v. Federal Trade Commission*, 295 Fed. 729; *L. B. Silver v. Federal Trade Commission*, 289 Fed. 985.

"In the present proceeding it is not claimed that the ultimate consumer has been prejudiced. It is nowhere asserted that the price to the ultimate consumer, the purchasing public, has been raised or in any degree affected by the acts complained of and the controversy seems to be one between the jobbers and the amount of the discount they should allow the retailers. *In view of the conclusion we have reached on the merits it is not important to consider whether the Federal Trade Commission has jurisdiction of such controversy as is here involved, and we express no opinion concerning it*" (Opinion, R., 1415-7). (Italics ours.)

We assume it is unimportant to consider here whether as a matter of practice the Commission should have found formally that the matter was of interest to the public. We are not arguing simply that the Commission should have found, as a jurisdictional fact, that the matter was of interest to the public; we are asserting not only that the matter was of no interest to the public, nor any part thereof, but was and is trivial.

"Paragraph Eight": In this paragraph counsel for Petitioner seems to assume that the Court regarded the interest of the public solely from the point of view of whether the activities complained about affected consumer prices.

It seems plain to us that any allusion the Court made

to consumer prices was simply to point out one of the features that indicated the triviality of this whole matter. However that may be, "Paragraph Eight", like "Paragraph Two", "Three", "Four" and "Five", assumes the identification of the Respondent with the jobbing association, contrary to the decision of the Court below, that there was not evidence of it.

Legal Practice.

Before going to "Paragraph One" (the first assignment of alleged error in the petition for certiorari), which we believe is the main, if not the only, point now before this Court, or taking up the main argument on that "Paragraph One", we desire to cite an excerpt from a recent decision of this Court, not indeed for the purpose of informing the Court, but for the purpose of indicating the scope and the limits of our argument:

"The jurisdiction to bring up cases by certiorari from the Circuit Court of Appeals was given for two purposes: First, to secure uniformity of decision between those courts in the nine circuits; and, second, to bring up cases involving questions of importance which it is in the public interest to have decided by this Court of last resort. The jurisdiction was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing. Our experience shows that 80% of those who petition for certiorari do not appreciate these necessary limitations upon our issue of the writ." (Opinion of Mr. Chief Justice Taft in *Magnum Import Co., Petitioner, v. Coty*, 262 U. S. 159, 67 Law Ed. 922.) The petition was denied.

It Is Not the Practice of this Court to Allow a Writ on Questions of Fact.

"* * * the rule is well settled that findings of fact concurred in by two lower courts will not be disturbed by this Court unless shown to be clearly erroneous"—citing cases—(Opinion of Mr. Chief Justice White in *Texas & Pacific Railway Co. v. Railroad Commissioners of Louisiana*, 232 U. S. 338, 58 Law Ed. 630).

"* * * pure questions of fact, depending on conflicting evidence and on the peculiar circumstances of the case, * * * had they been the only questions presented by this Court a writ of certiorari would not have been granted." (*Crossman v. Burrill*, 179 U. S. 100, 45 Law Ed. 106.)

In *Southern Power Co. v. North Carolina Public Service Co.* (263 U. S. 508), there was presented a case in which the District Court had decided in favor of the Petitioner for the certiorari; the Circuit Court of Appeals had reversed that decision and decided the case in favor of the respondent in certiorari proceeding. This Court disposed of the motion for certiorari without considering the merits:

"This writ must be dismissed * * * the argument developed that the controverted question was whether the evidence sufficed to establish actual dedication of petitioner's property to public use,—primarily a question of fact. That is not the ground upon which we granted the petition, and, sufficiently developed, would not have moved us thereto" (p. 509).

Argument.

We will designate this as our argument, but we realize that just as the object of this writ is not to give the defeated party a new hearing, so the duty of the respondent here is primarily to inform the Court; but not to contend with undue earnestness, or, at any rate, at undue length.

We feel bound first to call the attention of the Court to the view of Judge Hand. The last paragraph of the opinion is as follows:

"Judge Hand concurs in the result on the ground that by the dissolution of the Association the controversy became moot." (Opinion, R., fol. 1457 [1447].)

It should be emphasized that Judge Hand *concurred in the result*. He did not dissent and hold that our appeal should be dismissed because the controversy had become moot after the decision of the Federal Trade Commission and before the hearing of the appeal. Not at all. He concurred in the reversal of the order on the ground that the controversy was moot at the time it came for hearing before the Federal Trade Commission. Respondents alleged illegal activities implied the continuing activity of the Wholesale Tobacco & Cigar Dealers' Association of Philadelphia—or of its members acting by themselves as conspirators. This organization *existed only until June 9, 1922* (Commission's Findings, R., fol. 4032). The association "*ceased to function February 22, 1922, and was formally dissolved June 9, 1922*" (R., fols. 4090-4217). The complaint was dated May 29, 1922; the

first testimony was taken October 16, 1922, and the case was closed December 19, 1922 (R., fol. 4032).

If the association *ceased to function February, 1922*, it ceased to function *three months before the complaint was filed*, and by the Commission's own findings it "existed" until eleven days only after the complaint was filed, and there is no evidence that the conspiracy of the association went on after the organization was dissolved or even after it ceased to function as an organization. Hence, Judge Hand, in his concurring opinion, places himself on the ground that the order of the Federal Trade Commission against The American Tobacco Company, dated February 16, 1924, should be reversed and set aside because at least as early as February, 1922, or nearly two years before the date of the order, the controversy had become moot.

While we did not base our argument before the Circuit Court of Appeals on that ground, we believe that upon an application of this sort, in which the Petitioner must presumably bring themselves within the penumbra at least of Rule XXXV, these considerations should be before the Court, especially in view of the fact that our argument here is based on the contention that the case, so far from being important, is trivial.

No Evidence Against the Respondent.

"Paragraph One" of the "Questions Presented" (first alleged error), meets the issue fairly. It says:

"Is the Commission's finding that the American Tobacco Company agreed with the members of the Philadelphia Association to decline to sell its products to any jobber who did not maintain the prices

agreed upon by the jobbers, supported by evidence? The Court below held that it was not."

Now this is the issue: Petitioner asks the United States Supreme Court to sift and weigh the facts in this record of 1,164 pages of actual testimony, and then proceed to determine whether the Court's comments on the law—mostly *obiter*—were technically well stated.

The question whether the record contains *any* evidence to support a given finding of fact is, of course, technically a question of law; it is a question, however, that calls really for a consideration of the whole record and for the qualities of mind that are demanded in the determination of questions of fact. The mere citation of a question and answer from the record is not sufficient, for there may be other parts of the record that are completely destructive of the inference as to a fact that might be drawn from this question and answer, or that would leave such, at best, only a faint scintilla. A minority of the Commission and a majority of the Court have found there is no evidence to support the conclusion that there was combination or co-operation between this respondent and Tobacco jobbers in Philadelphia. If they are right and there was no such evidence, the decision was right, and a writ of certiorari should be denied. If they are conceivably wrong, indeed the real question remains one of fact, and, because the matter has lost importance and general interest, the writ of certiorari should still be denied. Three years and a half have elapsed since these activities are admitted to have ceased. The customers, whose orders The American Tobacco Company saw fit to decline for a few weeks, or a couple of months, have been contented and friendly customers for four and a half years. No retailer and no consumer as

far as we know ever complained about anything that The American Tobacco Company is alleged by the Federal Trade Commission to have done.

The Court below said :

"We have read this record carefully and are constrained to hold that in pursuing the course The American Tobacco Company adopted we fail to discover anything 'unfair' or 'unreasonable' or in any way contrary to public policy" (Opinion, R., fol. 1420).

"The examination of the testimony convinces us that what the American Tobacco Company is shown to have done is so far removed from constituting an unfair method of trade that it actually tended to promote fairness of trade and the suppression of unfairness in competition. Practices can not be regarded as fair which work the demoralization of the business, and practices can not be regarded as unfair methods of competition if the manufacturer declines to sell to wholesalers who demoralize the legitimate market by selling at prices which those in business regard as insufficient to enable the business to be conducted with reasonable profit. The American Tobacco Company was in our opinion within its rights in declaring that it would not sell to jobbers who made it a practice to sell to retailers at a price which made it impossible for the jobbers to carry on their business at a reasonable profit and worked the demoralization of the trade" (Opinion, R., [1455-6] [1445-46]).

The presiding judge in his Opinion discusses the evidence exhaustively at much greater length than he dis-

cusses the law. He manifests his careful consideration of the record by quoting from the record excerpts which, although they perhaps help to sustain the contention of counsel for the American Tobacco Company, were not alluded to upon the brief or the argument.

Comment on Petitioner's Brief.

We ask this Court to note that the last part of the quotation from the testimony of the late Percival S. Hill, former President of The American Tobacco Company, on page 16 of petitioner's brief, while correctly quoting the record, incorrectly quotes his testimony in that he later corrected himself. He meant to say the converse of what he is quoted as saying. Mr. Hill is quoted as saying:

"If it (meaning the practice) is satisfactory to The American Tobacco Company, it is satisfactory to the jobber."

Now that is what he said, but what he obviously meant was that if the practice is satisfactory to the jobber (so as to induce him to continue to handle The American Tobacco Company's products), it is satisfactory to The American Tobacco Company, which is a very different thing. It is this last that is of course the reasonable thing: The manufacturer of any article that goes to the consumer through jobbers and retailers is interested in the consumer getting the product at as low a price as is consistent (a) with the manufacturer himself getting a good profit; (b) with the jobbers and retailers getting enough profit to *satisfy* them, so that the channels to the consumer may be open and unimpeded.

Counsel for The American Tobacco Company, before the Examiner for the Commission, noticed Mr. Hill's inadvertence and upon cross-examination Mr. Hill corrected it.

"Q. What you meant to say, Mr. Hill, was, if the practice was one that the jobbers were satisfied with and their facilities were unimpaired, it was satisfactory to The American Tobacco Company?
A. I apologize for my bad use of the English language" (R., fols. 2395-7).

As for the balance of the excerpt (Petitioner's Brief, p. 16), Mr. Hill was simply led into saying that he talked sympathetically and good naturedly with two customers who desired perhaps more than Mr. Hill felt that he could lawfully promise. Mr. Hill testified on cross examination:

"Q. Did you, as directing the policy of The American Tobacco Company, ever consciously invite or co-operate in, in the making or carrying out of any agreements among jobbers or retailers that would limit their right to sell your products for what they pleased? A. I never have" (fols. 2411-2419).

After the quotation from Mr. Hill above noted petitioner's counsel state in their brief:

"While there is abundant testimony from which it is proper to draw the conclusion that The American Tobacco Company did agree to help the association maintain its discounts, this proof we submit makes it quite unnecessary to point out the numerous places in the record which themselves would justify the finding as to this agreement" (Brief, p. 16).

In trying to maintain its case, then, Petitioner quotes only one piece of testimony and that contains an obvious and avowed error! If there is other testimony, it would seem to us it is precisely what the Court would require to have pointed out before deciding whether it will read this 1,600 page record. We shall refrain from extended argument as to whether there is any evidence to support the Commission's findings. Our brief below was 73 pages long, most of it dealing with the facts, and our reply brief was 30 pages long, all of it dealing with the facts; and we believe that the Court will not care to hear from us at this time on the merits—except the merits as to whether this is a proper case for the issuance of the writ of certiorari.

Referring to *Texas & Pacific Railway Co. v. Railroad Commissioners*, above cited, we desire to call attention to the fact that while of course there is a different finding in the Circuit Court of Appeals from the finding by the Federal Trade Commission (the original fact finding body), there was a vigorous dissenting opinion in the Federal Trade Commission by one of the Commissioners who found precisely as did the Circuit Court of Appeals; therefore it seems that while the case above referred to is not controlling it should be to some extent persuasive, especially as the Commission unanimously dismissed the case against *P. Lorillard Company* on precisely similar suspicion.

In his dissenting opinion, Commissioner Van Fleet said:

"Of course conspiracy is often incapable of direct proof but when resort is had to circumstantial evidence as in this case the proof should rise above the dignity of mere suspicion. Some of the evi-

dence relied upon to sustain the order hardly ever rises to that dignity. Without summarizing the evidence to my mind it appears that the truth is that The American Tobacco Company had nothing to do with the organization of nor conduct of the Association and I know of no proof to the contrary. Also I believe its acts were taken independently of the Association and no real proof to the contrary appears. The Commission dismissed the case against the Lorillard Company for lack of proof and I believe that eliminating evidence of acts of others for which The American Tobacco Company was in no wise responsible and discarding mere conjecture there is not proof to warrant an order against The American Company" (R., fols. 4087-4089).

It is to be observed that there was such a complete harmony between the mind of Commissioner Van Fleet and the minds of the judges of the Circuit Court of Appeals that they quoted in the last page of their opinion this very excerpt from Mr. Commissioner Van Fleet's opinion, followed by the words:

"It must suffice now to say that we are entirely in accord with the conclusion at which he arrived, and we are of the opinion that there is no proof which warrants the order which the Commission entered" (Opinion, R., fol. 1457 [1447]).

The real question brought up here for decision, then, is the one above discussed, to-wit, whether the Court below correctly decided that there was no evidence to support the Commission's order.

The Law Was Not Incorrectly Held.

We come now to the consideration of whether an important question of law is involved or whether a serious error of law has been made or one which puts the Court in the Second Circuit at variance with the Supreme Court or the other circuits.

It is true that the Court says:

"The question here is not whether what had been done by The American Tobacco Company constituted a restraint of interstate commerce contrary to the Sherman Law and therefore unlawful. *The Federal Trade Commission is not clothed with jurisdiction to hear and determine that question in this proceeding*" (Opinion, R., fol. 1435 [1445]).

If it is argued that this pronouncement merits the issuance of a writ we may say, first, it is *obiter dicta* and it is not the practice of the United States Supreme Court to issue a writ, solely to review *obiter dicta* of the Circuit Court of Appeals; moreover, the very question as to whether the Federal Trade Commission has jurisdiction with respect to the Sherman Law is before this Court on a writ of certiorari allowed October 23, 1925, in the case of *Eastman Kodak Co., et al. v. Federal Trade Commission* (7 Fed. [2d] 994). We presume that this Court will not desire to issue a writ to decide a question of law which is already before the Court in another case, especially as that principle of law goes to the essence in the case before it and is merely *obiter* in this case.

Petitioner's counsel assert that the decision in this case runs counter to the decision in the *Beech-Nut* case;

but the presiding judge who wrote the opinion does not find it necessary to differentiate this case from *Federal Trade Commission v. Beech-Nut Packing Company*, 257 U. S. 441, by learned argument, by fine distinctions or by close reasoning; he simply says:

"The *Beech-Nut* case differs radically from the instant case" (Opinion, R., 1454 [1444]).

Let us see, by the familiar parallel-column method, how wrong Petitioner is, and how right the presiding Judge is:

"The Beech-Nut Packing Company . . . markets . . . its products through jobbers and wholesalers in the grocery, drug, candy and tobacco lines, who in turn resell to retailers in those lines."

We do that.

"Such wholesale and retail dealers are selected as desirable customers because they are known or believed to be of good credit standing, and"

We, of course, are somewhat concerned that our customers should have good credit standing.

"Willing to resell at the resale prices suggested by the company, and who do resell at such prices, and"

We never suggested any price at which the wholesaler should sell. The list price was merely a basis, but nowhere did the jobber resell at list. In some communities 2% off was perhaps reasonable; in others,

5% off was perhaps reasonable. All we ever suggested was that our customers should not do business at a loss, or a profit so slender that it would not, in the long run, be sound business for them.

"Are willing to refuse to sell, and who do refuse to sell, to jobbers, wholesalers and retailers who do not resell at the resale price suggested by the company, and who do not sell to such jobbers, wholesalers and retailers."

Here we put our finger on the matter that brought the *Beech-Nut* case within the provision of the statute—which requires that the proceeding shall be "to the interest of the public". The Beech-Nut Company tried, evidently, to fix the wholesale resale price and the retail resale price, and it dictated as to what retailers the jobbers should sell to, basing their dictates on whether the retailers maintained the price determined upon by the Beech-Nut Company. There is nothing like that in our case.

"The company . . . maintain . . . a policy known as the 'Beech-Nut Policy' and requests the co-operation therein of all dealers selling the products manufactured by it."

There is nothing like this in our case. Indeed, the allegation is not that we sought the co-operation of the jobbers or the Jobbing Association, but that they sought our co-operation. Of

course, the Commission's attorneys could not seek to bring us within the *Beech-Nut* case here in view of the fact that in point of time our Circular 2783—Exhibit 10—was about a year later than the beginning of the Association.

"In order to secure co-operation and to carry out the 'Beech-Nut Policy' the company issues circulars, price list and letters to the trade, * * * showing suggested uniform resale prices, both wholesale and retail."

There is nothing of this nature in our case. The "maintenance of a 'list'" is nothing more than an ancient, almost universal and convenient means of quoting prices, and the only letter to the trade that may be made the subject of pertinent discussion is Circular 2783, and even the *findings of the Commission* can import sinister meaning to that only by characterizing it as "*implying the same in veiled language.*"

"The Beech-Nut Company * * * requests and insists that the selected jobbers, wholesalers and retailers sell only to such other jobbers, wholesalers and retailers as have been and are willing to resell and do resell at the prices suggested by the Company."

That does not touch us.

"and requests and insists that such jobbers, wholesalers and retailers discontinue selling to other jobbers, wholesalers and retailers who fail to resell at the prices so suggested by the Company,"

"makes it known broadcast to such selected jobbers, wholesalers and retailers, whether sold direct or not, that if they * * * fail to sell at the resale price suggested by the company, it will absolutely refuse to sell further supplies of the product to them, * * * and will also absolutely refuse to sell to any jobbers, wholesalers and retailers whatsoever who sell to other jobbers, wholesalers and retailers failing to resell at the prices suggested by the Company."

That does not touch us, either.

We suggested no prices. We simply issued a list from which the jobbers might make a discount of 2%, 4%, 6%, or any other percent, that would give them a living, and as far as our threat, if it was a threat, in Circular 2783 was concerned, it is to be noted that we never did carry it out. We never suggested, at any time to anybody, that he should not sell to a person who was a price-cutter, nor did we ever do anything to indicate at what price the retailer should sell. Of course, it is inevitable that cigarettes and other tobacco products, which sell in packages fixed as to size, weight, contents or number will sell at a price that calls for a payment in as few coins as possible. Therefore, certain packages are known as a

twenty-five cent size or a ten cent size, as, for example, the famous PALL MALL advertisement: "A shilling in London; a quarter here". Now, PALL MALL might, or might not, sell for a quarter. The use by us, or by the public generally, of the terminology of currency to indicate or denote a particular size package is by no means a dictation of price to the retail dealer.

"It has refused, and does refuse, to sell to practically all such jobbers, wholesalers and retailers reselling to other jobbers, wholesalers and retailers, who have failed to resell at the prices so suggested by it."

This does not touch us.

"It has refused and does refuse to sell to practically all so-called mail order houses engaged in interstate commerce on the grounds that such mail order houses frequently sell at cut prices."

We even sell to mail order houses; nothing to the contrary appears on the record.

"It has refused, and does refuse, to sell to prac-

We, on the contrary, have not refused to sell any, ex-

tically all so-called price-cutters."

"The Company has and does reinstate as distributors * * * jobbers, wholesalers and retailers previously cut off * * * on the basis of declarations, assurances, statements, promises and similar expressions * * * by such distributors respectively who satisfy the Company that such distributors will thereafter resell at the prices suggested by it, and will refuse to sell to distributors who do not maintain such suggested resale prices."

"The Company has and does maintain card records containing the names of thousands of jobbing, wholesale and resale distributors, etc., etc."

cept temporarily in two cases, where it was necessary to reduce their account to normal.

The record shows, as above indicated, that we did not require any promises upon reinstatement.

We have no such system as that.

The Beech-Nut Company instituted the Beech-Nut policy and the question was whether their system was violative of the law. Here the jobbers tried to institute a price arrangement and the Commission tried to prove that the jobbers succeeded in involving this respondent

in it and they failed so to adduce any evidence to support such conclusion.

The Commission is Subject to Rule XXXV.

Possibly counsel for the Petitioner feels that any case in which the Federal Trade Commission is petitioner is in a special category and not within Rule XXXV. It is true, of course, that this Court has permitted great latitude in the allowance of applications for writs of certiorari to the Federal Trade Commission. This was proper and indeed necessary because the statute vitally affected the business of the country and in some aspects was novel and in some aspects uncertain—the Federal Trade Commission statute has, in these respects at least had some resemblance to Income Tax Laws.

The mere circumstance, though, that the Federal Trade Commission comes before this Court asking for a writ of certiorari does not take the case out of the rule. As long as the Federal Trade Commission Act was a new statute, uninterpreted, that very fact tended to throw some given cases within the rule but never made the rule inapplicable. Many cases have gone to the Supreme Court in recent years under the Federal Trade Commission Act, and as the statute gets more and more construction it will need less and less construction in the future. We believe the time is not far distant when it will be difficult to find a question under the Federal Trade Commission Act which merits the issuance of a writ. However that may be, we submit that the United States Supreme Court will not care to review questions of fact, even in a Federal Trade Commission case, when such are of utter triviality.

This Court has recognized that the same rules apply in Federal Trade Commission cases as in other cases.

The writ was denied in *Mishawaka Woolen Mfg. Co. v. Federal Trade Commission* (283 Fed. 1022; 260 U. S. 748). That was an application by the company, and the writ was denied assuming that the Federal Trade Commission would modify its order to conform with the order in the *Beech Nut* case in accordance with the concession of the Solicitor-General that the order which was affirmed by the Circuit Court of Appeals was broader than the order in the *Beech Nut* case.

Petitions by the Commission for writs of certiorari were denied in *Mennen Co. v. Federal Trade Commission* (288 Fed. 774; 262 U. S. 759), and in *National Biscuit Co. v. Federal Trade Commission*, and *Loose-Wiles Biscuit Co. v. Federal Trade Commission* (299 Fed. 733; 266 U. S. 613). Writs were denied to the respondent companies in *Aluminum Co. of America v. Federal Trade Commission* (284 Fed. 401; 261 U. S. 616), and *Bulterick Co. v. Federal Trade Commission* (4 Fed. (2d) 910; 267 U. S. 602).

The application for writ of certiorari should be denied.

Respectfully submitted,

JUNIUS PARKER,
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*Of Counsel for The American
Tobacco Company.*

Supreme Court of the United States

October Term, 1922.

FEDERAL TRADE COMMISSION,

Petitioner,

against

THE AMERICAN TOBACCO COMPANY,

Respondent.

No. 97

SUPPLEMENTAL BRIEF FOR RESPONDENT

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Counsel for

The American Tobacco Company

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1926.

FEDERAL TRADE COMMISSION, <i>Petitioner,</i>	}	No. 279
<i>against</i>		
THE AMERICAN TOBACCO COMPANY, <i>Respondent.</i>		

SUPPLEMENTAL BRIEF FOR RESPONDENT.

It is not our purpose in this reply to reargue the evidence, but, as the brief for the Federal Trade Commission contains in its Statement of the Case certain inaccuracies as to the facts, we think the Court's attention should be called to them. For example, on page 5 it is stated:

I.

"The Commission * * * entered an order on February 16, 1924, against the wholesalers and against the American Tobacco Company, requiring them and each of them to Cease and Desist from the use of the method of competition alleged in the complaint and set out in the Findings (Rec., p. 723)."

The method of competition alleged in the Complaint is a conspiracy to maintain fixed prices between the

Wholesale Tobacco & Cigar Dealers' Association of Philadelphia, its officers, directors and certain dealers who were members of the Association, and are referred to in the complaint as the members; and The American Tobacco Company and P. Lorillard Company, who are called Respondent Manufacturers.

The complaint alleges that "Respondent Manufacturers **cooperated and conspired with the Association and its members,**" (Rec., 5, fol. 13) to maintain such prices. The Cease and Desist Order against The American Tobacco Company restrained it from **assisting and agreeing** to assist any of **its dealer-customers** in maintaining and enforcing, etc. (Rec., 725, fol. 1361). The statement therefore that The American Tobacco Company was required to cease and desist from the use of the method of competition alleged in the complaint is clearly erroneous.

The Order not only does not conform to the allegations of the complaint but enjoins something less than the conspiracy with which the complaint charges respondent, less indeed than any unlawful conduct or unfair methods of competition. It enjoins giving assistance. The Order is impossible of enforcement, requiring as it does The American Tobacco Company to

"cease and desist from assisting * * * any of its dealer-customers in maintaining and enforcing in the resale of cigarettes and tobacco products manufactured by the said The American Tobacco Company, resale prices for such cigarettes and other tobacco products, fixed by any such dealer-customer by agreement, understanding or combination with any other dealer-customer of said The American Tobacco Company."

It is shown in the Record and admitted (Commission's brief 8) that tobacco products are sold at certain discounts off list prices and that the jobbers use the

manufacturers' lists, with or without discount, in sales to retailers. Undoubtedly every manufacturer who issues a list with a discount from the list may be taken as suggesting to his jobber customers that they sell at the list and retain the discount—in the tobacco business 10%—to cover their cost of operation and profit. Suppose that two of The American Tobacco Company's dealer-customers, without the knowledge of The American Tobacco Company should agree to observe The American Tobacco Company's list prices, then The American Tobacco Company would have violated the Order. This Order places the Respondent at the mercy of each, any and all of its dealer-customers. An agreement between any two of them to observe Respondent's price list would render the Respondent liable to the penalties of violation of the Order.

II.

On pages 8 and 9, the brief for the Commission states:

"Accordingly, negotiations were entered into by the Association with The American Tobacco Company for the purpose of securing the assistance of that Company in the Association's activities regarding price fixing. The Association sought and secured the cooperation of The American Tobacco Company in such persuasion and intimidation (Rec., pp. 430-431)."

We submit that there is no evidence of any "negotiations" and the statement that the Association "sought and secured the cooperation of The American Tobacco Company" is entirely unsupported.

The testimony in the record at the place referred to (pp. 430-431) is the transcript of a verbal sparring match between the Commission's attorney and the late Percival S. Hill, then President of The American Tobacco Company. The attorney being somewhat more adroit than

Mr. Hill, led him to say that if a price condition was satisfactory to The American Tobacco Company it was satisfactory to the jobbers. This perhaps is what is referred to in the Commission's brief.

Quite obviously this was not what Mr. Hill meant, and he testified on cross examination as follows:

"Q. Mr. Hill, in response to a question on re-direct examination, you said, of course, to my recollection, that if the profit of jobbers in a given community was satisfactory to the American Tobacco Company, it was satisfactory to the jobber. Did you mean that? A. Well, I meant—yes, I meant it in this way: A price that is satisfactory to the American Tobacco Company is a price that permits the people who are distributing our goods to make a living, and if the people that are distributing our goods are making a living, it is satisfactory—the conditions are satisfactory to them.

"Q. Well, is it always satisfactory to the jobber? A. He always wants—

"Q. By merely making a living? A. He wants to make more, of course.

"Q. Well, then, you do not say that if the price was satisfactory to the American Tobacco Company, it is necessarily satisfactory to the jobbers, do you? A. No, not to be technical. Of course, I do not suppose it is exactly that.

"Q. What you meant to say, Mr. Hill, was if the price was one that the jobbers were satisfied with, and their facilities were unimpaired, it was satisfactory to the American Tobacco Company? A. *I apologize for my bad use of the English language*" (Rec., 441, fol. 799).

Mr. Hill further testified (Rec., 429):

"Q. Mr. Hill, you have said in answer to the direct examination of Mr. Smith that Mr. Eberbach undoubtedly visited you in 1921 and that you had no reason to deny that Mr. Krull* visited you.

*These men were officers of the Philadelphia Association.

Did you say to either of these gentlemen or both together that The American Tobacco Company would support or cooperate with or farther the activities of their Association? A. No, sir.

"Q. In any way? A. Not at all."

This part of Mr. Hill's testimony is not referred to.

III.

It is then stated (Commission's brief 9)

"Names of offending dealers were furnished to the American Tobacco Company requesting its assistance in the enforcement of its system of price fixing and the American Tobacco Company upon receiving such information proceeded to investigate, and upon finding that an offending dealer was cutting prices, refused to furnish the dealer with further supplies" (Rec., p. 383, Com. Exhibit 16, Rec., p. 232).

Rec., p. 383 is the testimony of O'Boyle who was asked if he was told the reason why direct shipment of goods to a Philadelphia jobber named Seider was discontinued. He answered that he thought he was told unofficially

"I think it was because—I understood at the time, I think, he was selling merchants in Philadelphia at less than the price in effect here by this group of jobbers."

This sort of supposition and surmise is hardly the basis for a positive statement much less a finding.

Commission's Exhibit 16, referred to in the extract from the Commission's Brief just quoted is what is called the Sales Department Work Sheet of The American Tobacco Company, dated September 7, 1921. It gives in the list of "Accounts added to our List of Direct Customers" three concerns and under the designation "Ac-

counts Discontinued on our List of Direct Customers", there are fourteen names. It is interesting to observe their geographical distribution and the reasons given for their discontinuance:

- Bertig Bros., Paragould, Ark. (Retailers.)
- S. Z. Joseph Merc. Co., Paragould, Ark. (Retailers.)
- Robt. McLane Co., Cameron, Texas (credit reasons); also branch at Caldwell, Texas.
- Kelly Bros. Co., Fernandina, Fla. (Inactive)
- Capital City Gro. Co., Tallahassee, Fla. (Credit reasons.)
- R. W. Davis & Co., Atlanta, Ga. (inactive)
- Oglesby Bros., Atlanta, Ga. (No cooperation.)
- Murphy Bros., Camden, N. J. (Sales reasons.)
- Bernstein & Kursman, Inc., Bridgeport, Conn. (Sales reasons.)
- Armstrong Gro. Co., Okeechalee, Fla. (closed out); branch at Dayton, Fla.
- J. S. Penkussohn Cig. Co., Jacksonville, Fla. (closed out); branch at Savannah, Ga.
- American Grocers Society, Inc., Pittsburgh, Pa. (Sales reasons.)
- Nathan Rosenblum, Sharon, Pa. (No cooperation.)
- Sher & Sinograd, Milwaukee, Wis. (Sales reasons.)

Sales Department.

"No cooperation" obviously means that the dealer named did not try energetically to sell the respondent's brands.

The fact that names appear on this list of dealers, some of them separated by a thousand miles, is no evidence that the account of any of them was discontinued at the instance of the Philadelphia Association. It could as well be argued, that the American Grocers Society of Pittsburgh or Oglesby Bros. of Atlanta, Georgia (both of whom appear on it) were placed on the discontinued list on account of the intimidation and coercion of the

Philadelphia Association, as that Murphy Bros. were placed on it for that reason.

IV.

The statement is then made in the Commission's brief (p. 9)

"During the period of fixed prices, as set out hereinbefore, The American Tobacco Company issued circular letters to its wholesalers, which in effect signified that that Company would cooperate in the maintenance of prices fixed by its jobbers in any given territory. This letter was also a veiled threat that the company would refuse to continue selling to any of its customers who would sell at prices less than those fixed by a majority of its customers in any given territory. (Rec., p. 672)."

This record reference is to Commission's Exhibit 10.

To appreciate how signally this letter fails to sustain the statement made concerning it, we quote it in full:

Circular No. 2783

The American Tobacco Company, Incorporated.

111 Fifth Avenue, New York, June 29, 1921.

To our Jobbing Customers:

It is of the highest interest to this company to maintain permanent means of distributing its brands of tobaccos and cigarettes by efficient and business like methods.

We can only expect to obtain and hold customers when it is possible for jobbers to sell our products profitably.

It is obvious that a jobber of our products who sells at prices which would not permit of the tobacco business itself being profitable, or the business on our brands being profitable taken by itself, is a jobber who in the long run will be a detriment and not a benefit to our business as our customer.

Any jobber who sells our products without

profit or with such a small profit that it will not benefit him to continue permanently in the tobacco jobbing business on such a margin of profit is not a distributor who can afford us a safe and permanent avenue of distribution, and, if by his persistent price cutting he discourages and destroys the interest in our brands with competing jobbers we may eventually be left without adequate means of thorough distribution in his locality.

For this reason we are convinced that for the future of our business we are bound to prevent as far as we reasonably and lawfully may such demoralization in the trade so far as our products are concerned. This does not mean price maintenance but it does mean that where a jobber is not interested in making a fair and reasonable profit on our brands and elects to sell our products for motives of his own, at less than a living profit, we are forced to the conclusion that he is not sufficiently interested in our goods to make a desirable permanent customer and we shall feel at liberty to remove him from our list of direct customers.

We trust that this policy will have the approval of all customers who are concerned in making a livelihood out of the tobacco business.

Very respectfully,

The American Tobacco Company, Inc.,
George W. Hill, Vice President.

George W. Hill

It will be observed that this letter is dated June 29, 1921 and as the Philadelphia Association was organized in 1920 it certainly did not induce the organization of the Association.

V.

The Commission's Brief then resumes (p. 9), referring to this letter,

"Of course, it applied to the Philadelphia and Camden territory."

It applied to the whole United States and represented the policy of the American Tobacco Company independently conceived and applicable everywhere.

VI.

On page 10, the Commission's brief states,

"The American Tobacco Company knew of the Association's price agreements and expressly agreed with the Association to help its members to maintain those price agreements. (Rec., pp. 430-431.)"

The record reference is to the testimony of Mr. Hill, President of The American Tobacco Company, and depends upon what Mr. Hill meant by the word "satisfactory". Counsel fail to quote Mr. Hill's statement at Rec. 440 and the statement on the same page (Rec., 431).

"Q. So continuing to be specific, did not you say to Mr. Eberbach and Mr. Krull, or to either of them, that you would assist them or cooperate with them in selling at a discount of not greater than 8 percent? A. I certainly did not."

VII.

The Commission's brief resumes (page 10).

"The American Tobacco Company cut off from its direct list a price-cutting competitor of the members of the Association. This jobber, continuing to resell at prices in effect by him previous to the organization of the Association, and refusing to comply with the direction of The American Tobacco Company that he join (Rec. 315), was removed from the list of distributors of the Tobacco Company for the purpose of assisting the Association to maintain its price agreements (Rec. 383)."

This must have reference to the Seider incident but the record references which are given, do not sustain the statements in the brief. Record 315 is the deposition of Charles Seider who testified concerning an interview with O'Boyle,

"A. So far as I can recall he spoke about the conditions that were existing at that time and asked whether we would not comply with the prices that were given out by the Association."

"Q. Did you know these prices that had been adopted by the Association? A. Yes, sir.

"Q. Do you know whether Mr. O'Boyle knew them? A. That I don't know.

Seider further testified (Rec. 331):

"Q. Neither did the American Tobacco Company ever exact from you any promise or agreement as to what prices you would sell your goods? A. No.

"Q. And never gave you any orders about selling your goods at any particular price? A. No.

"Q. That is true? A. Yes."

"Q. Did O'Boyle say anything more at any time about the price at which you were selling your goods? A. No, sir. (Rec. 332)

"Q. Did Mr. O'Boyle say anything to you about the prices at which you were selling your products? A. No.

"Q. He said nothing? A. No." (This refers to a second conversation).

The testimony signally fails to justify the broad statement in the Commission's brief.

VIII.

The brief then states (p. 10):

"The American Tobacco Company removed from its list of customers another of its price-cut-

ting jobbers for the purpose of assisting the Association in maintaining its fixed prices (Commission's Exhibit 16, Rec., p. 232)."

Commission's Exhibit 16 is the Sales Department Work Sheet previously referred to. It contains the names of fourteen dealers scattered all over the country who were dropped for various reasons—credit, inactive, closed-out, sales reasons, and it is as rational to assume that Murphy Bros. whose name appears upon it were dropped at the behest of the Philadelphia Association as it is that Bernstein & Kursman of Bridgeport, Conn., were. The fact is that shipments to Murphy Bros. were temporarily discontinued on September 7, 1921 (Rec., 232) because they owed respondent as much as \$35,000 (Rec., 424). They were restored to the list on October 4, 1921 (Rec., 223). Mr. Murphy however did not even know his firm had been dropped until informed of it during his testimony in this case (Rec., 264).

IX.

The brief then resumes (p. 10):

"This jobber had been expelled from the Association for price-cutting (Rec., 237-239)."

The jobber referred to being obviously Murphy Bros.

This represents the extreme of uncandid inference. Mr. James Murphy testified (Rec., 236) that he withdrew from the Association about December, 1921 with his brother (Rec., 237). They were not expelled. Murphy stated (Rec., 242), that he had what he described as a "spat". He testified:

"Q. And the spat lasted five or ten minutes?

"A. Yes, sir. It didn't amount to anything and we all went out.

"Q. Well, you resigned from the Association right there, didn't you?

"A. Yes, sir.

"Q. Did you tell Mr. Eberbach you were withdrawing from the Association?

"A. Yes, sir. I told them all—all that was there—that I was through with the Association."

This occurred after a dinner in the Bourse Building, Philadelphia (Rec., 238). The Murphys did not attend until late and did not go to the dinner. They did not go to the Bourse Building that evening for the purpose of attending the meeting of the Association.

"A. No. We were practically disgusted with the Association."

The witness testified (Rec., p. 240):

"Q. Did they say anything about the tobacco manufacturing companies?

"A. Not to my recollection.

"Q. Did they say anything about the American Tobacco Company?

"A. Not to my recollection . . .

"Q. Did they say anything about any of the salesmen of the American Tobacco Company?

"A. Not that I can remember."

It is interesting to note that Commission's Exhibit 16 is dated September 7, 1921, and announced the discontinuance of Murphy Bros. on the direct list of The American Tobacco Company (along with fourteen others) whereas Murphy Bros. were then members of the Philadelphia Jobbers Association and did not resign until December, 1921. So when direct shipments to them were discontinued on September 7, 1921, they were still members of the Association. They were restored to the direct list on October 4, 1921 (Rec., 223, Exhibit 21) while they were still members of the Association but when they got out of the Association in December, 1921, the American Tobacco Company kept right on selling them (Rec., 254).

Mr. Murphy testified that the longest delay that his firm experienced in getting goods was three weeks on a shipment from Louisville (Rec., 263) and that there were no unusual delays (Rec., 264).

X.

The Commission's brief states (p. 10):

"In addition to the assistance furnished by the tobacco company to the Association in the latter's price-fixing scheme, it also cooperated by way of withholding shipments of goods to two members of the Association who were suspected of price cutting and who had been reported by officers of the Association to The American Tobacco Company as being suspected of having cut the Association's prices (Rec., 386-387)."

This relates apparently to Fermani and Blumenthal. O'Boyle was examined. Both Fermani and Blumenthal told him that their shipments were being held up. O'Boyle reported to The American Tobacco Company (Rec., 386). He testified:

"Q. What was said to you by your superiors when you reported that Blumenthal said that his shipments were being held?

"A. I think his shipments came forward immediately.

"Q. Did you ever investigate or have anyone under you investigate the prices at which Fermani was selling or the discounts he was allowing?

"A. No, sir.

"Q. What do you say as to Blumenthal?

"A. No, sir."

It will be observed that all of the testimony commented on in the foregoing pages is the testimony of witnesses called by the Commission and it seems to us

that these quotations demonstrate that there are no statements of fact in the Statement of the Case made by the Commission which are to any extent sustained by the testimony. It is not surprising then that the Circuit Court of Appeals held that the Commission's Order had no proof to support it.

XI.

We cannot refrain from mentioning the argument made on pages 50-51 of the Commission's brief:

"There is, therefore, it is true a conflict in the testimony. The Commission found as a fact there was an agreement. This testimony (finding!) we have shown, is supported by competent proof—and the court below either ignoring the competent and legal proof of an agreement, or resolving the conflict in the testimony in favor of The American Tobacco Company found that there was no proof of an agreement. This we contend the court below had no right to do. The Statute provides:

'The findings of the Commission as to the facts, if supported by testimony shall be conclusive.'

This finding therefore was conclusive upon the court below. It was the intention of Congress that the Commission should be the fact finding body and that the Circuit Court of Appeals should not interject its views of the facts where there is a conflict in the evidence."

We have quoted this argument rather fully so as fairly to present it.

The statement implies that there is testimony on the Commission's side and testimony on the respondent's side and raises the inference that the Commission weighed this conflicting testimony and found in its own favor and against The American Tobacco Company, that it had the right so to do and that its finding is conclusive and cannot be disturbed.

What is the so-called conflict in the evidence? There is no conflict. A conflict in the evidence occurs where one witness testifies to one thing and another witness testifies to another thing; when there are different versions of what happened and one or the other must be accepted.

"The conflict in the evidence" upon which the Commission's argument is based, on investigation proves to be an incident which occurred during the testimony of Mr. Hill, then President of The American Tobacco Company. He was called as a witness by the Commission. In the course of a protracted and argumentative examination by the Commission's counsel, Mr. Hill, not understanding a question, gave the answer quoted on pages 49 and 50 of the Commission's brief. When later his attention was called to the fact that his answer was ambiguous, he apologized for his "bad use of the English language" (Rec., 440) and then testified as quoted on page 50 of the Commission's brief (Rec., 441), expressly and explicitly stating that The American Tobacco Company never at any time made any agreements with any jobbers limiting their right to sell respondent's products for what they pleased, which is the truth as the Circuit Court of Appeals found.

Mr. Hill, in this so-called "conflict of testimony" said at an early part of his examination: "If it (meaning the price) is satisfactory to The American Tobacco Company, it is satisfactory to the jobber". Mr. Hill put his "if" in the wrong place; he meant "It (meaning the price) is satisfactory to The American Tobacco Company if it is satisfactory to the jobber", meaning thereby that if the jobber was satisfied with the profit he was making (using "jobber" in the collective sense) then The American Tobacco Company would be satisfied, because as long as the jobbers were satisfied with their profit, The American Tobacco Company would have an adequate number of distributors, and that is all it wanted. So long as the jobber was satisfied with his profit, the lower the price

the better The American Tobacco Company was pleased, as Mr. Hill testified (Rec., 418).

To say that there is a conflict in the testimony when a single witness who in direct examination misunderstands a question and makes an awkward answer, has his attention called to his mistake, apologizes for his bad English and corrects his answer, is a quaint conceit. That the Commission should base a finding on the mistake and ignore the correction seems incredible. But not only did it do so, it now contends that the Circuit Court of Appeals was without power to set the finding aside.

There is no conflict of testimony with respect to the agreement which the Commission charges between The American Tobacco Company and the Philadelphia Association. The testimony is all one way. Everyone who could know whether or not there was an agreement says that there was none. This is the uncontradicted and unimpeached testimony of the officers of The American Tobacco Company and of the Philadelphia Association.*

XII.

We do not know what counsel mean on page 50 by saying "the making of the agreement admitted by Mr. Hill on direct examination". We have said enough, we think, to show that this statement is a mistake.

XIII.

With the exception of the Commission's Complaint and Findings, the only thing in this record which we are able to find which mentions an agreement between The

* Mr. Hill (Rec., 429, 441). Answer (Rec., 11). Bragan—Secretary (Rec., 41, fol. 91, Rec., 50, fol. 109). Elberbach—President (Rec., 82, fol. 116, Rec., 99, fol. 196). Krull—Treasurer (Rec., 355, fol. 645), does not recall anything that Mr. Hill said (Rec., 363, fol. 658) certainly does not remember asking Mr. Hill for support (Rec., 363, fol. 658), was in Mr. Hill's office five minutes and does not recall a single thing that was said (Rec., 364, fol. 659). There was nothing more than a general discussion of trade conditions (Rec., 364, fol. 660). Krull never mentioned the interview to the Philadelphia Association (Rec., 369, fol. 669).

American Tobacco Company and the Philadelphia Association is the testimony of one Louis T. Cowie, an attorney and Examiner of the Federal Trade Commission. Cowie was sent to Philadelphia to investigate the jobbers association. He had no independent recollection of the events concerning which he testified (Rec., 148), but over objection he was allowed to read from a typewritten report made by him to the Commission. He dictated his report from notes not produced, three days after the occurrences purported to be stated in it (Rec., 136). The report was taken from the official files of the Commission on the day Cowie testified. He had not seen it in the meantime (Rec., 152).

Cowie was permitted to testify over objection what Harvey D. Narrigan, one of the Vice Presidents of the Philadelphia Association, told him that the representative of the tobacco manufacturers told Narrigan, for example (Rec., 141):

"he (Narrigan) stated that the Jobbers Association had instructed Mr. Eberbach, its President, to call upon the American Tobacco Company and the Lorillard Company and request them to assist the Association in maintaining the prices or the account fixed by the Association. Mr. Eberbach did so and later reported to the Association that both of these Companies had agreed to do so."^{*}

* Mr. Narrigan himself was interrogated and he said (Rec., 283, fol. 521):

Q. Now, this report you notice said you had told Mr. Cowie that the Jobbers' Association instructed Mr. Eberbach, its President, to call on The American Tobacco Company, and the Lorillard Company? A. I never understood any such thing. I didn't know of any such thing taking place.

Q. This report says Mr. Eberbach was to ask their officials—that is, The American Tobacco Company and P. Lorillard Company to assist in maintaining the discount fixed by the Association. Did you tell Mr. Cowie that? A. No, sir; positively not.

Q. Or that Mr. Eberbach went to those companies? A. Positively not.

Q. And that he later reported to the Association they had agreed to do so? Did you tell Mr. Cowie that? A. Positively not, sir.

Q. Do you know whether there was a committee of the Association ever appointed to call on the manufacturers? A. There was no committee of the Association or committee at all, appointed by the Association.

The Commission's finding and order in their language so closely follow Cowie's statement that they must have been based upon it (Rec., 776, fol. 75). For example one finding is (Rec., 777, fol. 76).

"Said American Tobacco Company * * * agreed with the said Association and its members to help them maintain the price agreements * * *".

The language of the order (Rec., 780, fol. 82) is also strikingly like Cowie's report. The report from which Cowie read must have been filed with the Commission in September or October 1921 (Rec., 151, fol. 291) the findings which follow it so closely in language as well as substance were made February 16, 1924. Testimony was taken in the meantime, but apparently in this case the usual order of procedure was reversed and the findings of fact preceded instead of followed the evidence.

This situation confirms Mr. Justice Holmes' comment on the complaint in this case in *Federal Trade Commission v. American Tobacco Company*, 264 U. S. 298-307. "The investigations and complaints seem to have been only on hearsay or suspicion".

The testimony of its own investigator read from a written report to the Commission dictated after the pretended conversations, detailing what the investigator reported as statements made to him by another of what still another said is hearsay gone mad. While perhaps the Federal Trade Commission as an administrative body may relax the strict rules of evidence in its proceedings, still it is both complainant and Judge and to accept hearsay twice removed seems to transcend even what is reasonable in the case of a non-judicial fact finding body. To base findings upon such gossip is grotesque.

XIV.

It is argued on pages 42 and 43 of the Commission's brief that the American Tobacco Company signified its cooperation with the Association in a letter to a member of the firm of Murphy Bros. A part of that letter is quoted and the following argument is advanced.

"It does not seem that one can escape the conclusion that this letter means cooperation."

We do not desire to extend this brief unduly but we think it our duty to the Court to facilitate an examination of the record for the purpose of getting at the truth. The incident referred to was a matter of routine business entirely unrelated to the allegations of the complaint and therefore can not raise the slightest suspicion in support of the Commission's assertions. A full explanation of this business transaction is in the record.*

Briefly, The American Tobacco Company "put on a deal" in connection with introducing a new brand called 111 Cigarettes—a familiar business expedient. By this deal the jobber was authorized to ship the retailer a quantity of Sweet Caporal Cigarettes free provided a 12-carton order included one carton of 111 Cigarettes. The circular which "put on" the deal provided that the jobber should report the gratis goods shipped by him to retailers and be reimbursed by credit memorandum. The provision for credit for gratis goods did not permit gratis to sub-jobbers. The jobbers claimed credit for gratis to dealers whom Mr. Bevill, the sales manager, knew as sub-jobbers, and he declined at first, therefore, to honor these reports from the jobbers. Their reply was that business was no longer done in Philadelphia through the instru-

* Trade Circular 2748. The American Tobacco Company's Exhibit 5 (Rec. p. 701). Bevill's testimony (Rec. 511, fol. 934 to 512 fol. 936, and 514 fol. 941 to 516 fol. 943, also 522 fol. 955).

mentality of sub-jobbers and all jobbers customers were treated as retailers. On the strength of this, after a visit to Philadelphia to investigate, Mr. Bevill reimbursed the jobbers. He sent the same form of letter to all the jobbers whom he reimbursed, not to Murphy Bros. only (Rec., 521, fol. 953). Surely it is not on such "evidence" that Commission's "findings" must be deemed conclusive by the Federal Courts!

XV.

The Commission argues:

- "II. The complaint and findings set out an unfair method of competition
 - (A) Price fixing by agreement is an unfair method of competition
 - (B) Price maintenance by combination or co-operation is an unfair method of competition."

The American Tobacco Company never fixed prices on its goods. What it objected to was their sale at prices so low as to impair its facilities of distribution. In Commission's Exhibit 10 (Rec., 672) it advised all of its jobbing customers: Jan. 29, 1921.

"Any jobber who sells our products without profit or with such a small profit that it will not benefit him to continue permanently in the tobacco jobbing business on such a margin of profit is not a distributor who can afford us a safe and permanent avenue of distribution, and, if by his persistent price-cutting he discourages and destroys the interest in our brands with competing jobbers we may eventually be left without adequate means of thorough distribution in his locality.

For this reason we are convinced that for the future of our business we are bound to prevent as far as we reasonably and lawfully may such demoralization in the trade so far as our products are concerned. **This does not mean price maintenance**, but it does mean that where a jobber is not interested in making a fair and reasonable profit on our brands and elects to sell our products, for motives of his own, at less than a living profit, we are forced to the conclusion that he is not sufficiently interested in our goods to make a desirable permanent customer and we shall feel at liberty to remove him from our list of direct customers."

and in Exhibit 33, May 2, 1921 (Rec., 682) it notified its customers:

"It is not our purpose here to establish the price at which our merchandise is sold; that is a matter which rests entirely in the hands of our customers in any given community.

We have no hesitation, however, in assuring you that where a customary price prevails in a given community, we are entirely within our legal rights in removing from our direct list of customers any customer who, by selling our merchandise at less than the prevailing price in that community, thereby destroys the interest of our customers as distributors of our product."

And in Commission's Exhibit No. 34 Nov. 5, 1921 (Rec., 683) Respondent said:

In connection with your inquiry, we beg to state that **we here are not interested in nor do we cooperate with any association of jobbers or wholesale grocers whatsoever.** We are simply interested in the proper distribution of our brands by the legitimate distributor, and to this end we state that it is not our purpose to establish the price at which our merchandise is sold; that is matter which rests entirely in the hands of our customers in any given community."*

* The emphasis is ours and the quotations are parts of longer letters.

The circular letters containing the statements quoted were not sent to Philadelphia particularly, they were sent to respondent's jobbing customers throughout the United States either uninvited or in answer to inquiries.

The position of respondent as explained in these letters the Commission concedes is entirely lawful. There is, the Commission admits, nothing unlawful done or threatened by the respondent and no unfair method, but it asserts that because the lawful acts and fair methods happened to coincide with the interest of an alleged unlawful combination among its customers in Philadelphia, as well as to serve the interest of respondent both in Philadelphia and elsewhere, they become *ipso facto* unlawful — an unfair method of competition everywhere. This is to us confused thinking.

For argument's sake, even supposing the combination and respondent's participation, it is a serious question, we think, whether lawful acts, not characterized by oppression, bad faith, fraud or deceit can be an unfair method of competition on the part of the actor even though performed in furtherance of a combination which may be unlawful. The test of unfairness is in the thing that is done. The Sherman Law provides a remedy for the unlawful combination, but Section 5 of the Federal Trade Commission Act, upon which this proceeding is founded, is directed solely at unfair methods of competition. It is only the unfairness of the method with which it is concerned. If the thing done is not unfair that ought, we think, to end the matter.

Respectfully submitted,

EDWARD S. ROGERS,

JONATHAN H. HOLMES,

Counsel for The American

Tobacco Company.

Supreme Court of the United States

OCTOBER TERM, 1902.

No. 279.

FEDERAL TRADE COMMISSION,

Petitioner,

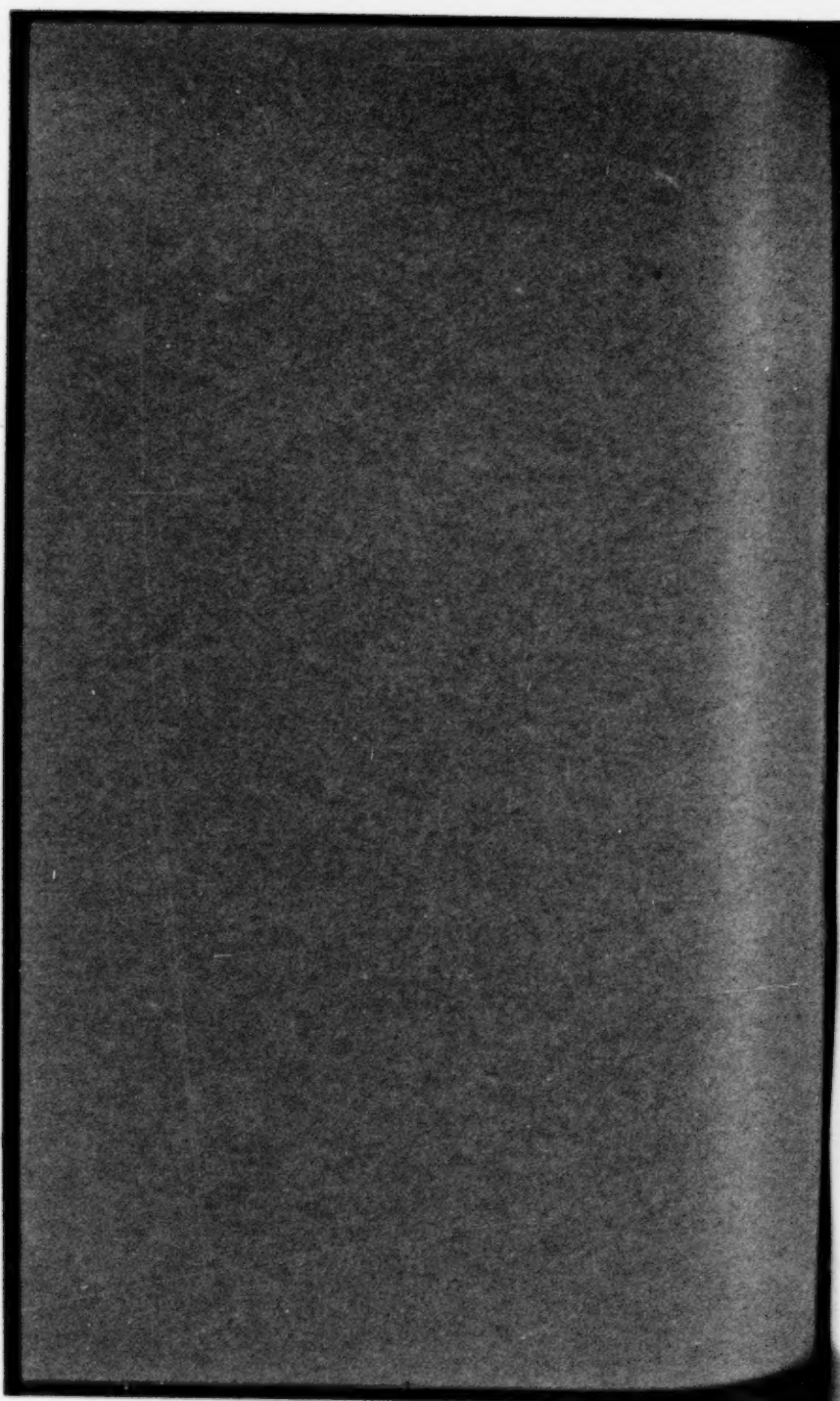
against

THE AMERICAN TOBACCO COMPANY,

Respondent.

BRIEF FOR RESPONDENT

EDWARD S. BOWEN,
JONATHAN H. HOLMES,
Counsel for
The American Tobacco Company.



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SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1926.

FEDERAL TRADE COMMISSION,
Petitioner,

against

THE AMERICAN TOBACCO COMPANY,
Respondent.

No. 279

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Statement.

This proceeding was begun by the Commission on May 29, 1922, under Section 5 of the Federal Trade Commission Act. The parties made respondents in the Complaint were Wholesale Tobacco & Cigar Dealers' Association of Philadelphia, Pennsylvania, its officers, directors and certain dealers, members of the Association, this group being referred to in the Complaint as "The Members"; The American Tobacco Company and P. Lorillard Company, who are designated in the Complaint as "Respondent Manufacturers". The purpose of the proceedings was to restrain alleged unfair methods of competition consisting of price maintenance resulting from a conspiracy asserted to exist among the Association, its officers, directors and members. The Complaint alleges that

"Respondent Manufacturers cooperated and conspired with the Association and its members and participated in said price maintenance system."
(Rec., 5, fol. 13.)

On February 16, 1924, a Cease and Desist Order was entered against The American Tobacco Company, as follows:

"That the American Tobacco Company cease and desist from assisting and from agreeing to assist any of its dealer customers in maintaining and enforcing in the resale of cigarettes and other tobacco products manufactured by the said The American Tobacco Company, resale prices for such cigarettes and other tobacco products, fixed by any such dealer customer by agreement, understanding or combination with any other dealer customer of said The American Tobacco Company." (Rec., 725, fol. 1361.)

A Cease and Desist Order was also entered on the same date against the Association and its members. The Complaint against P. Lorillard Company was dismissed.

The Wholesale Tobacco & Cigar Dealers' Association of Philadelphia ceased to function in February, 1922, and was formally dissolved June 9, 1922. (Rec., 717, fol. 1344, Rec., 727, and following fols. 1366, 1368, 1370, et seq.)

Neither the Association nor any of its members made application for a review of the Order against them. The Association had been out of existence for two years when the order to cease and desist was made. We are not concerned, therefore, with that part of the Order addressed to the Association and its members, but only with the Order against The American Tobacco Company.

This order was entered over the vigorous dissent of Commissioner VANFLEET, who said (Rec., 780):

"Without summarizing the evidence to my mind it appears that the truth is that The American Company had nothing to do with the organization of nor conduct of the association and I know of no proof to the contrary. Also I believe its acts were taken independently of the association and no real proof to the contrary appears.

The Commission dismissed the case against the Lorillard Company for lack of proof and I believe that eliminating evidence of acts of others for which The American Company was in no wise responsible and discarding mere conjecture there is not proof to warrant an order against The American Company." (Rec., 726, fol. 1363.)

On The American Tobacco Company's petition, the Order was set aside by the Circuit Court of Appeals of the Second Circuit (9 Fed. Rep. 2d S. 570). Judge ROGERS, among other things, saying (Rec., 804):

"It must suffice now to say that we are entirely in accord with the conclusion at which he (Commissioner VANFLEET) arrived, and we are of opinion that there is no proof which warrants the order which the Commission entered."

Judge LEARNED HAND concurred in the result on the ground that, by the dissolution of the Association before the Complaint was heard by the Commission, the controversy had become moot. (Rec., 804).

Accepting the Commission's own version of the consequences of the conspiracy which it has so circumstantially charged and which it asserts it has proceeded against in the public interest; it appears that one jobber, Murphy Brothers, whose credit was stretched nearly to the breaking point, had a shipment of The American Tobacco Company's goods delayed for credit reasons for one month from August 29, 1921, to October 4, 1921. Another Jobber, Charles Seider, was off the direct list of The American Tobacco Company for a few months, April 20, 1921, to August 13, 1921. Two other jobbers, Blumenthal and Fermani, in 1921 were delayed on one occasion in getting their shipments. These were the only results of the alleged conspiracy. No one was even inconvenienced and the price to the consumer was not affected in the least.

The Commission's Findings.

The Commission's findings may be summarized as follows:

That the Philadelphia Jobbers Association undertook among themselves to maintain prices and sought and secured the cooperation of The American Tobacco Company, with respect to its brands, to that end; the Association reported to the Company the names of dealers who failed to maintain prices. The Company, upon receiving this information, proceeded to investigate the facts and if it found that the dealer reported was cutting prices on its goods, it refused to furnish more of them to him (Rec., 721).

The Commission reached its conclusion of illegality upon a specific finding that the Tobacco Company, after investigating a complaint made to it by the Association, discontinued selling to Charles Seider from April 20, 1921 to August 13, 1921 (Rec., 722, fol. 1355); that, after investigating complaints of price-cutting made by the Association against Murphy Brothers, it discontinued selling to them in the period from August 29, 1921 to October 4, 1921 (Rec., 722, 723, fols. 1355-56), that shipments were withheld from Fermani and Blumenthal in 1921 because of complaints made by the Association that these dealers were cutting prices on The American Tobacco Company's brands (Rec., 723, fol. 1356) while it was investigating the facts so reported.

There was no allegation that The American Tobacco Company and P. Lorillard Company, the two manufacturers made respondents in the complaint, entered into any agreement with each other to fix the prices charged by them for their respective manufactured products and no allegation that they entered into any agreement, express or implied, or took any cooperative action whatever with respect to anything.

Theory of Commission and Conduct of Respondents.

The theory of the complaint seems to be that the Wholesale Association of Philadelphia (which included wholesale dealers living in and doing business in Camden, N. J.) entered into an unlawful agreement and that they used the manufacturer, The American Tobacco Company, as an instrument to coerce wholesale dealers or jobbers, members of the association, who did not keep their agreements, and non-members who sold goods at a price below that fixed by the association.

The American Tobacco Company answers that it kept aloof from the association and that in the two instances in which it discontinued for an appreciable time the shipments of orders of customers it acted for its own protection, for credit reasons or because its means of distribution were becoming threatened, or for both reasons, and not because it was influenced by the importunities of the association or its officers or members.

The association was charged with having agreed upon a price and they were found to have agreed upon a price; but no effort was made to show that there was any profiteering or that the price was unduly high or procured for jobbers more than a legitimate profit for the service rendered.

The American Tobacco Company, following an almost universal trade custom, issues a price list. Its prices at the time were the list prices less 10% off as a trade discount and 2% as a cash discount—"10 and 2". The evidence is that no attempt was ever made by the members of the Philadelphia Association, to obtain a profit in excess of 5% and this 5% is inclusive and not exclusive of the 2% cash discount. That is, they sold at 8 and 2—later at 7 and 2—"off the list." There is no proof and no attempt to prove that any one was injured in any way by the alleged activity of the Philadelphia jobbers.

There is no evidence to show and no attempt was made to show, and it is not true, that retail prices were increased by any activity of the Philadelphia Wholesale Association or its members. There is no evidence to show and no attempt was made to show that any retailer ever complained of injury or ever was injured by any activity of the Philadelphia Association. Indeed there is no effort made to show that the jobbers, whose shipments were temporarily held up by The American Tobacco Company, were themselves in any way injured. Seider, a cigar manufacturer, was obviously using The American Tobacco Company's produces for "bait" to sell his own goods. James Murphy did not know that his orders had been held up until the Commission's counsel told him so when he was testifying.

The Problem of Tobacco Merchandising.

For a clear understanding of this case a brief mention of certain business facts is necessary. The consumer as a rule—which is almost a universal rule—buys his requirements from day to day. Consumers in the United States are served by three-quarters of a million stores. The manufacturer must see to it that all of these stores are supplied with his products all the time, because, if a consumer cannot get his favorite brand of tobacco or cigarettes where he usually trades, he will probably buy another brand and become accustomed to using it and so a patron of the company whose brands are not well distributed will be lost.

This problem of supply cannot be solved, however, by inducing the retailer to carry a large stock because tobacco products keep fresh for only a limited time.

The jobber therefore performs a very useful function. First the aggregate of jobbers must serve all the retail dealers, and second their service must be so uni-

form and frequent that each retail dealer is always supplied with fresh goods as far as possible. The problem is a difficult one for the manufacturer.

We need not burden this court with a discussion of how and why price wars arise among jobbers. It will be clear, however, we think, that when they do arise the jobber or jobbers who undersell others tend to drive their competitors into other lines of business and the result is—starting from a point where the jobbers in a community are adequate in number to serve the retail trade—that a price war among jobbers demoralizes or disorganizes the orderly machinery of distribution.

The goodwill of a brand of cigarettes or other tobacco product has cost in advertising or otherwise, and is worth, many millions of dollars and the preservation of that value depends upon the maintenance of the proper machinery of distribution. Hence the manufacturer is very much concerned when many jobbers become dissatisfied with the wholesale tobacco business by reason of excessive competition.

The functions of a jobber are (a) to carry a stock of goods, (b) to fill the orders of the retail dealer, (c) to solicit orders through traveling salesmen and (d) to extend credit to the retail dealer.

The business of distribution could not be effectively carried out without substantial and well equipped business houses in every community performing all the wholesale dealers functions. It is undoubtedly true that the well equipped and conservative wholesale house, which performs all the jobbing functions, is more valuable as a customer but cannot sell at as small a margin of profit as one who performs only a part of the necessary functions—the part which he can perform at least expense.

For example, one of the functions of a jobber is to take drop shipment orders sent to him by the retailer,

voluntarily or at the instance of a salesman employed by the manufacturer. The drop shipment order is an order given by the retailer for the shipment to him of goods direct from the manufacturer, on which the manufacturer pays the freight or express. The manufacturer sends the bill to the jobber who has taken or accepted the order and the jobber in turn charges the retailer. In this transaction the only function of the jobber is to be responsible for the credit. The manufacturer can not be frowned upon from the standpoint either of law, or business, if he looks with disfavor upon a customer who performs effectively only one, and that the easiest and most profitable of the jobber's functions, such as taking drop shipment orders. Perhaps the most undesirable customer is the one who uses trade marked articles for "bait"—selling the trade marked articles at a loss which is recouped by the sale of articles of the dealer's own manufacture, or standard articles not carrying a brand name or trade mark. This was one incident of the Philadelphia situation.

The matter of credit is closely bound up with the matter of price. If a jobber initiates or otherwise engages in a price war, it is obvious that the tendency is for him to buy and resell more goods the more he lowers his price. In other words, as he lessens his profits he increases his debit account with the manufacturer. This was another incident of the situation in Philadelphia.

Of course the manufacturer does not desire that the jobber shall sell at an exorbitant price. On the contrary the manufacturer's interest lies in the jobber selling at the lowest price that will maintain a profit sufficient to induce enough jobbers to remain in business in any given community to supply adequately the retail trade. This is obvious because, other things being equal, the less money goods cost the consumer the greater will be the volume of sales.

However, on account of the delicately balanced machinery of distribution and the need for the constant flow of products to the retailer, the manufacturer feels that his business is jeopardized when jobbers complain of lack of profits due to excessively low prices induced by over-competition.

Summary of Argument.

The American Tobacco Company contends that: The findings of the Commission on which the order is based are not supported by any evidence.

(a) There is no proof that respondent employed unfair methods of competition. At most it delayed shipments of its goods to four of its customers, of its own accord and for valid business reasons. "Unfair methods of competition" implies a system, a plan or method, not a number of casual occurrences.

(b) There is no proof that respondent entered into any agreement, combination or contract, written or oral, express or implied, with the Philadelphia Wholesale Tobacco Dealers Association or its members, or any of them or with anybody. On the contrary, there is positive proof that it did not.

The proof is that respondent acted lawfully for its own protection and there is no proof that it conspired or "cooperated" with the Association for unlawful ends or in aid of unfair methods of competition.

The only disputed question in this case is whether anything has been proved against the respondent. The Federal Trade Commission has shown certain acts of The American Tobacco Company, from which it seeks to draw inferences of sinister purpose. We have shown the lawful and proper purpose of each of the acts in question. We assert there is no evidence to support the conclusions of the commission.

The whole controversy, then, is one concerning evidence—not of the weight of the evidence but whether there is any evidence at all which proves the allegations of the Complaint. One Commissioner, (VanFleet), held that there was none, saying:

“* * * to my mind it appears that the truth is that The American Company had nothing to do with the organization of nor conduct of the Association, and I know of no proof to the contrary.” (Rec., 726, fol. 1363).

The Commission dismissed the Complaint against P. Lorillard Company, although that Company was charged along with The American Tobacco Company with the same alleged unlawful acts under the same circumstances, and thus it seems to us the Commission itself has held that as the same acts when committed by P. Lorillard Company do not amount to unfair methods of competition, equally they do not when done by The American Tobacco Company. In this connection, Commissioner VANFLEET remarked:

“The Commission dismissed the case against the Lorillard Company for lack of proof and I believe that eliminating evidence of acts of others for which The American Company was in no wise responsible and discarding mere conjecture there is not proof to warrant an order against The American Company.” (Rec., 726, fol. 1363).

The Circuit Court of Appeals set aside the Commission's Order because there was no evidence to support it. Thus, on this question of fact, one member of the Commission and the Circuit Court of Appeals are in entire accord. The Commission now asks this court to review this question of fact, and to hold that there is evidence to justify an Order requiring The American Tobacco Company to “cease and desist from assisting and from agreeing to assist any of its dealer-customers in maintaining and enforcing in the re-sale of cigarettes

and other tobacco products manufactured by the said The American Tobacco Company, re-sale prices for such cigarettes and other tobacco products, fixed by any such dealer-customer by agreement, understanding or combination with any other dealer-customer of said The American Tobacco Company." (Rec., 725, fol. 1361).

We believe that this Court is disinclined to reverse decisions of lower tribunals on questions of fact, including the question whether there is any evidence to support a given finding, but should the Court feel that the testimony in this case requires further study by it, we have prepared a schedule which is printed as a schedule to this Brief (post, p. 29) containing a discussion of each of the Commission's findings, with quotations from the testimony showing in what respect we think they are without support in the record.

II.

Argument.

What is an unfair method of competition is a question of fact.

The Commission, in entering its order against The American Tobacco Company, proceeded under Section 5 of the Federal Trade Commission Act which gives authority to issue a cease and desist order against "unfair methods of competition".

What is an unfair method of competition? It cannot be merely an act; method implies continuity. A method is a way, not an incident. There must be, we think, some sort of systematic unfairness to amount to unfair methods, (Mr. Justice Brandeis in his dissent in *Federal Trade Commission v. Gratz*, 253 U. S. 421, intimated that this was his view). Method is procedure according to definite principles, not a number of casual

occurrences. We speak of one who intentionally does things repeatedly in the same way as a methodical person, an orderly grouping of material as a methodical arrangement. We distinguish the modern method of teaching law by cases from the lecture system. The name Methodists originally was given in derision to those Oxford students who met with the Wesleys, because they followed a fixed system of study and conduct. So it seems to us that when in Section 5 of the Federal Trade Commission Act, Congress forbade unfair methods of competition in commerce it must have meant a systematic course of conduct characterized by deception, bad faith, fraud or oppression (*Federal Trade Commission v. Gratz*, 253 U. S. 421, not such a situation as this record shows, four instances of delayed shipments to customers for valid business reasons.

In order to appreciate the soundness of the conclusion of the Court below that the Respondent was not guilty of unfair methods of competition, it is necessary to understand the facts with respect to the sale of tobacco products and the particular evils which had grown up in the business at the time to which this proceeding relates. These we have already discussed. As this Court has said on many occasions, unfair competition is a question of fact and is to be determined with reference to the particular conditions which exist in the industry.

In the language of Mr. Justice Pitney in *International News Service v. Associated Press*, 248 U. S. 215, at page 236:

"Obviously, the question of what is unfair competition in business must be determined with particular reference to the character and circumstances of the business."

In *Chicago Board of Trade v. United States*, 246 U. S. 231, Mr. Justice Brandeis said (238):

"But the legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. Every agree-

ment concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint, and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences. The District Court erred, therefore, in striking from the answer allegations concerning the history and purpose of the Call rule, and in later excluding evidence on that subject. But the evidence admitted makes it clear that the rule was a reasonable regulation of business, consistent with the provisions of the Anti-Trust Law."

When viewed in the light of the facts as they existed during the time to which this proceeding relates. We think that what respondent is shown to have done was merely what a sensible man would do and might lawfully do for the protection of his own business and that the law as announced by this court in *U. S. v. Colgate & Co.*, 250 U. S. 300, *Federal Trade Commission v. Beechnut Packing Co.*, 257 U. S. 441 and *Federal Trade Commission v. Raymond Bros. Clark Co.*, 263 U. S. 565 has not been departed from. These cases as we interpret them, define the following as the rights, pertinent to this case which an individual manufacturer may exercise:

(1) He may name, suggest and recommend prices at which he wishes his goods resold. He

may state the reasonableness of such prices and the benefit to be derived from their observance;

(2) He may announce his intention to refuse sales to those who sell his goods at prices which differ from the resale prices which he suggests.

(3) He may refuse sales to those who do not observe such prices.

The Circuit Courts of Appeal seem in recent cases to have sustained the right, which the respondent here claims, to choose its customers and to refuse to trade with dealers whose conduct, with respect to respondent's goods, in its opinion, has a tendency to obstruct their distribution.

In *Cream of Wheat Co. vs. Federal Trade Commission*, 14 Fed. (2d) 40, 50, the Circuit Court of Appeals of the Eighth Circuit, decided that the sales policy of the Cream of Wheat Company was lawful and not an unfair method of competition. This policy embraced requesting customers not to sell Cream of Wheat at less than a stated minimum price; refusing to sell when this request is disregarded; announcing in advance an intention thus to refuse; and informing itself through agents, advertisements and other legitimate means as to the prices at which Cream of Wheat is being sold.

In *Harriet Hubbard Ayer v. Federal Trade Commission*, 15 Fed. (2d) 274, Certiorari denied March 15, 1927, the Circuit Court of Appeals of the Second Circuit held that a manufacturer may prescribe conditions under which he will deal with jobbers and retailers, and occasional instances of refusal to sell to a price cutting dealer was not an unlawful method of competition.

"He should be permitted," said the court, "to exercise the privilege which the law accords him of selecting his customers, and refusing to sell to customers who undermine the market by becoming price cutters. He should not be hampered in conducting his legitimate business. Section 5 of the

act does not give the Federal Trade Commission power to thus regulate trade policy."

It seems clear, therefore, that respondent had the right to refuse to sell any dealer for any reason or no reason, just as any dealer had the right to refuse to buy of respondent for any reason or for no reason. And since no reason is needed for the refusal, the validity of the one assigned is immaterial, but if respondent believed, as it did from its past experience, that its business might be demoralized, the distribution of its goods obstructed by the action of some dealers in unreasonably cutting prices on them, and that the value of its trade marks might be seriously impaired, it had a right to say so at the time, or before, it refused to sell price cutters.

We do not believe that there will be any dissent from the foregoing statement of what the law is. Neither do we think that there will be dissent from the statement that if a manufacturer, who does not desire to adopt the drastic method permitted him by *United States vs. Colgate* (supra) but prefers to indicate to dealers that he will refuse to sell them if they adopt so low a reselling price as to do injury to his business, he may attempt to inform himself, by conference with jobbers or otherwise, as to a minimum resale price, sales below which will inevitably injure his business. This is an important proposition of law as applied to the tobacco trade, because conditions vary in different parts of the country. We believe, moreover, that it is the law that the manufacturer may confer not only with one jobber or separate jobbers, but that he may confer with several jobbers in the territory affected, and that he may invite conferences among jobbers themselves to get their opinion as to what is, in the circumstances, the minimum price below which, under the conditions prevailing in that particular community, certain injury to his brands and business lies.

It is this last proposition, if any, that will be disputed. Some people seem to assume that the rules of law which are intended to preserve competition between ostensible competitors must also preserve hostility between them, or absolute isolation.

It is undeniably true that agreements to eliminate competition need not be express agreements, and it is equally true that the existence of agreements—express or implied—may be evidenced by conduct or other circumstantial proof. It is not true, however, that the mere existence of a customary price is sufficient to prove the existence of an agreement (*Frey v. Cudahy*, 256 U. S. 208).

With respect to many articles, visits to a hundred retailers in the City of New York would show absolute uniformity of price, but there does not exist the shadow of an agreement between these hundred retail dealers. We feel sure that if jobbers in a given community, in an association or out of it, confer and unite in the forming and in the expression of opinion to a manufacturer that sales of his product below a given minimum price will work injury to his brands and business in that community (assuming that the jobbers are left free to conduct their own business as they see fit)—there is no violation of law, and no violation of law on the part of the manufacturer who invites it. (This though is not what we did; but rather what we were charged with doing.)

The legitimacy of conferences among competitors, has been recognized by the courts. In *Maple Flooring Manufacturers' Association v. United States*, 268 U. S. 563, Mr. Justice STONE said (582):

"It is not, we think, open to question that the dissemination of pertinent information concerning any trade or business tends to stabilize that trade or business and to produce uniformity of price and trade practice. Exchange of price quotations of market commodities tends to produce uniformity

of prices in the markets of the world. Knowledge of the supplies of available merchandise tends to prevent overproduction and to avoid the economic disturbances produced by business crises resulting from overproduction. But the natural effect of the acquisition of wider and more scientific knowledge of business conditions, on the minds of the individuals engaged in commerce, and its consequent effect in stabilizing production and price, can hardly be deemed a restraint of commerce, or, if so, it cannot, we think, be said to be an unreasonable restraint, or in any respect unlawful."

The lawfulness of exchanging information and conferences among competitors is recognized by Judge BUFFINGTON in *United States v. United States Steel Corporation*, 223 Fed. 55, 154. A succinct statement of what we conceive to be the law is made by Judge MORTON in *United States v. Piowaty*, 251 Fed. 375, 377:

"In my opinion, unlawful agreement is the essence of the offense of combination or conspiracy under the Sherman Act. It is what separates what is permitted from what is forbidden. To hold it illegal for persons in the same business and same trade organization and after exchanging information and views, to act in the same way, but independently of each other, on buying, selling, or prices, would extend the scope of the act beyond anything heretofore decided, and beyond its proper meaning, and would cause the greatest confusion and uncertainty."

It seems to us apparent that the Federal Trade Commission thought when it filed this complaint that The American Tobacco Company had been guilty of conduct condemned in the *Schrader* case, 252 U. S. 85, or in the *Beechnut* case, 257 U. S. 441. From this record, and from the findings of the Commission itself, it is obvious that there has been no such conduct.

The Commission has not even proved the necessary facts.

It may be well again to mention that the Federal Trade Commission does not charge and does not attempt to prove that any harm was done to any individual, firm, or corporation by the alleged practices of which it complains but only that they came within the category of unfair methods of competition as the Commission interprets this phrase.

(a) The Sherman Law is not involved.

The Federal Trade Commission may have assumed that a technical violation of the Sherman Law is *ipso facto* an unfair method of competition but of course that is not so. The Federal Trade Commission Act gives the Commission jurisdiction to issue a cease and desist order against "unfair methods of competition" (Sec. 5) only when it "shall have reason to believe that any . . . person, partnership or corporation has been or is using any unfair method of competition in commerce and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, etc." (Sec. 5).

The same acts may violate the Sherman Law and constitute an unfair method of competition, but we believe it to be self-evident that there may be a violation of the Sherman Law—for example, a monopoly arrived at by a combination by purchase of all competitors—which might be satisfactory and beneficial to all of them, and which would therefore not be an unfair method of competition.

We submit that the jurisdiction of the Federal Trade Commission is dependent upon the existence of a state of facts which connotes unfair methods, and when those facts are proved, it is unimportant whether they do or do

not also amount to a violation of the Sherman Law or any other law; and if those facts do not constitute or connote unfair methods of competition, the fact that they violate the Sherman Law is immaterial. "Unfair methods of competition" is not the equivalent of restraint of trade. A showing that the Sherman Law is violated is not conclusive one way or the other. To prove that there was a technical and trifling, as distinguished from a harm-working, violation of the Sherman Law is therefore, we believe, not sufficient to constitute proof of unfair methods of competition within the meaning of the Federal Trade Commission Act.

Indeed, this was well stated in *Federal Trade Commission vs. Beechnut Packing Co.* (supra) where it was said in the prevailing opinion (p. 453):

"The Sherman Act is not involved here except in so far as it shows a declaration of public policy, to be considered in determining what are unfair methods of competition, which the Federal Trade Commission is empowered to condemn and suppress."

Mr. Justice HOLMES, in his dissenting opinion in that case, said (p. 456, 457):

"The ground on which the respondent is held guilty is that its conduct has a dangerous tendency unduly to hinder competition or to create monopoly. It is enough to say that this I cannot understand. So far as the Sherman Act is concerned, I had supposed that its policy was aimed against attempts to creat a monopoly in the doers of the condemned act or to hinder competition with them."

(b) The Sherman Law was not violated by respondent.

To discontinue two, three, or four accounts temporarily for reasons of our own, is not a violation of the Sherman Law and the fact, if it is a fact, that the Whole-

sale Association may have desired that we take that action is immaterial even if the Association was violating the Sherman Law. A violation of the Sherman Law by Philadelphia jobbers in the organization and operation of a conspiracy in restraint of trade (assuming such violation only for the purposes of the argument) does not make the Association so infectious as to taint everyone coming into contact with its members. Otherwise, anyone having any relation with an unlawful association, who, independently, may happen to conduct himself in a way which coincides with the purposes of the conspirators, becomes a party to the crime, even if, as here, there was no duress and no agreement but only action taken in furtherance of the respondent's own interest and for its own benefit.

There must, we think, be an agreement of some sort before anyone becomes a conspirator, and no agreement is shown in this case between The American Tobacco Company and the Wholesale Association. Whether the Association was violating the Sherman Law or not under our view above set forth, we cannot believe that a violation of the Sherman Law by the Jobbers' Association constituted an unfair method of competition on the part of The American Tobacco Company.

(c) This case is not governed by the Beechnut Case.

In *Federal Trade Commission vs. Beechnut Packing Company* (*supra*) the outstanding fact is that the Beechnut Packing Company had a system or policy—a method—which it itself instituted. There was no denial of this. It was referred to in the opinion as the "Beechnut policy" and the "Beechnut system of merchandising." The complaint charged that the Beechnut Packing Company "in order to accomplish the illegal purposes intended" required purchasers of its goods to do certain things.

That is neither the fact nor is it the theory of the Commission in the present case. The essence of the

charge against The American Tobacco Company is that an Association of jobbers in Philadelphia "sought and secured" its cooperation—that they drew it into a conspiracy that they initiated.

The Federal Trade Commission was not concerned with proving anything in the Beechnut Case because that case was submitted upon an agreed statement of facts. Here, on the contrary, the Commission, like any other complainant, has the burden of proof, and it is bound to prove an unfair method of competition by respondent.

It is evident that respondent had no systematic policy. There was no method of competition fair or unfair. At most two or four sporadic attempts were made to prevent the disorganization of our facilities for the distribution of our goods, and these attempts were influenced as much by an anxiety to curtail over-extended credit as to protect and preserve proper distribution. Indeed the Federal Trade Commission entirely ignores the business necessity of protection against over-extended credit, and makes the gratuitous assumption that temporary discontinuance of the two over-extended accounts was due to an attempt at coercion solely for price fixing reasons, and not only so but that it was done at the behest of and after agreement with the Philadelphia Wholesalers Association and to further its interests only.

While we believe that the law is definite, we believe that we should state our understanding of it as applicable to certain things which we admit having done and point out the authority on which we relied to sustain the propriety of our action. We are not aware of any opinion of this court in which it was ever held that anything less than a contract express or implied was sufficient to sustain a finding of unlawful conspiracy to fix prices.

When the activities complained of are alleged to have taken place, *Frey & Sons, Inc. vs. Cudahy Packing Company* (*supra*) had been decided and *Federal Trade Commission vs. Beechnut Packing Company* (*supra*) was

pending undecided in this court. It may perhaps be assumed that The American Tobacco Company proceeded with some regard for the law as then declared, and it was settled at that time that no contract, express or implied, for the maintenance of resale prices was permissible under the Sherman Law (we are not now arguing whether the Sherman Law is applicable to this situation). We believe that a plain statement of the law is set forth in *Frey & Sons vs. Cudahy Packing Company*, 256 U. S. 208, 210, which had been published before the alleged occurrences complained of. While that case involved some difficulty over matters of procedure, the law was plainly stated. The plaintiff, Frey & Sons, recovered a judgment for treble damages in the District Court, which was reversed in the Circuit Court of Appeals. Frey & Sons then came to this Court, having waived a new trial and consented to final judgment in favor of their opponents in the event they lost here. This Court held that if any errors were made by the District Court, then the judgment of reversal by the Circuit Court of Appeals would be confirmed although the Circuit Court of Appeals itself may have misinterpreted the law in that reversal. Mr. Justice McReynolds, in the prevailing opinion, set forth one part of the charge which was held to be error. This then gives us a negative statement of the law, or a statement of what the law is not, but for our purposes such a statement is precisely as useful as a statement of what the law is. It is equally clear whether the court holds it is lawful to do so and so, or it is not unlawful to do so and so. Now this is what the Judge in the District Court charged:

"I can only say to you that if you shall find that the defendant indicated a sales plan to the wholesalers and jobbers, which plan fixed the price below which the wholesalers and jobbers were not to sell to retailers, and you find defendant called this particular feature of this plan to their attention on

very many different occasions, and you find the great majority of them not only expressing no dissent from such plan, but actually cooperating in carrying it out by themselves selling at the prices named, you may reasonably find from such fact that there was an agreement or combination forbidden by the Sherman Anti-Trust Act." (256 U. S. 208, 210, 211.)

As to this charge, Mr. Justice McREYNOLDS said:

"The recited facts, standing alone (there were other pregnant ones), did not suffice to establish an agreement or combination forbidden by the Sherman Act. This we pointed out in United States vs. Colgate & Co. As given, the instruction was erroneous and material." (256 U. S. 208, 211.)

This we conceive to be a plain statement of the law.

The Colgate Case also had certain technical aspects; that is, this Court held that it must accept the District Court's interpretation of the indictment. Mr. Justice McREYNOLDS said (p. 306, 307):

*"Our problem is to ascertain, as accurately as may be, what interpretation the trial court placed upon the indictment,—not to interpret it ourselves; and then to determine whether, so construed, it fairly charges violation of the Sherman Act * * **
*We cannot, e. g., wholly disregard the statement that 'the retailer, after buying, could, if he chose, give away his purchase or sell it at any price he saw fit, or not sell it at all, his course in these respects being affected only by the fact that he might by his action incur the displeasure of the manufacturer, who could refuse to make further sales to him, as he had the undoubted right to do' and we must conclude that, as interpreted below, the indictment does not charge Colgate & Company with selling its products to dealers under agreements which obligated the latter not to sell except at prices fixed by the company * * * in the absence of any purpose to create or maintain a mo-*

nopoly the Act (Sherman Act) does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal. And, of course, he may announce in advance the circumstances under which he will refuse to sell."

We challenge the Commission to point out any fact which tends to prove that we were not within the law as laid down in these cases which had been decided before the time of the alleged acts complained of. Not only does this case differ from the Beechnut Case on the facts (a) In that we were not the promoters of any plan, (since we *declined to be used unlawfully for the ends of others in the promotion of their plan*); but (b) *we neither sought assurances nor entered into any understanding, tacit or otherwise*. We believe that the Beechnut Case is not difficult to reconcile with the Colgate Case but it seems that confusion has arisen in the minds of many lawyers, and indeed perhaps in the minds of some judges who may have assumed that because a conspiracy to fix prices may be proved by a course of conduct, that, ergo, a course of conduct that succeeds in stabilizing prices is unlawful. This is a *non sequitur*. An unlawful agreement may be proved by a course of conduct from which it is reasonably inferable, but the course of conduct must prove an unlawful agreement, express or implied, written, oral or tacit, in order to constitute conspiracy. The facts deduced from the course of conduct must prove what is, in contemplation of law, an agreement, because, as Mr. Justice Holmes said in *U. S. vs Kissel*, 218 U. S. 601, 608: "A conspiracy is a partnership in criminal purposes," and an agreement is indispensable.

In his opinion in the Beechnut Case, Mr. Justice DAY said: "The success or failure of the plan depended upon a tacit understanding with purchasers and prospective purchasers."

We realize that there is language in the prevailing opinion in the Beechnut Case which, standing alone, might, if the case is not thoughtfully considered, give rise to the idea that Mr. Justice DAY meant that working to achieve the same end without agreement express or implied might constitute a violation of the Sherman Law, but a careful reading of the prevailing opinion indicates clearly that Mr. Justice DAY was considering the case as one in which a contract existed by "tacit understanding", by "satisfactory assurances" and other incidents from which implied agreements were spelled out.

We conceive the law to be that the facts shown must support a finding that a system of agreements (implied or tacit perhaps, but still agreements, meetings of the mind, applicable to goods already sold, tying a contractual string to those goods) must exist for a violation of the law to exist. It is not the existence of a plan, or calling attention to it, or following it, that constitutes a violation; it is not a threat to cut off a customer who does not keep a price; it is not the act of cutting him off when he does not keep that price; it is not that a plan is unlawful simply because it works, unless it is unlawful *per se* to have a uniform price, which, we suppose, no one would assert. But the facts shown must prove a contract, and the rule that a contract may be proved by indirect evidence or implied from a course of dealing does not diminish the burden of proof. That circumstantial evidence is admissible does not relieve a party from adducing it in quantity and quality sufficient to prove his case.

It is not enough to show that the interest of several parties is served by the same condition. It cannot be assumed that such condition, if it is brought about, was brought about by unlawful agreement rather than by a lawful concatenation of circumstances. Simply because the protection against the threat of real and substantial and definitely concrete money loss may have led the re-

spondent into action in certain sporadic cases that served certain customers' interest, it does not follow that we entered into an unlawful conspiracy with them.

The question whether there was an agreement between The American Tobacco Company and the Philadelphia Jobbers' Association is entirely one of fact. Is the Commission's conclusion that there was an agreement supported by evidence? The Court below held that it was not. Commissioner Van Fleet says in his dissenting opinion (Rec., 781)

"when resort is had to circumstantial evidence as in this case the proof should rise above the dignity of mere suspicion. Some of the evidence relied upon to sustain the order hardly ever rises to that dignity."

III.

Conclusion.

The question presented by this case is whether a manufacturer may assist his customers to make a living profit in the sale of his goods by receiving (without pre-arrangement and without invitation) reports from them of dealers who are selling his brands at ruinous prices and thus forcing all his customers to sell without profit, and if the truth of these reports upon investigation is established, whether the law requires him to sit still and stand mute when he sees a price war develop among his customers with his trade marked goods as the bone of contention the result of which is to obstruct their distribution and destroy his trade mark property, or, may he, in self-defense, take steps to disarm the persons who are making war on him by refusing to furnish them the weapons which they are using for his own destruction.

In short, may he exercise his right to select his customers by excluding those whose dealings in his goods

he believes to be detrimental to his interest by the destruction of his business good will? Good will is merely the reasonable expectation of future custom. Trade marks and brands are a means of realizing this expectation by furnishing to the consumer identifying marks so that preference may be exercised, otherwise no intentional future custom is possible. It is on this principle that the imitation of trade marks is restrained—the reasonable expectation of future custom is interfered with by fraud. But this expectation may be interfered with otherwise than by fraud. In this case, when, for example, Lucky Strike cigarettes are so dealt in by one wholesale dealer that others decline to handle them with the result that retailers, and hence the public, cannot get them, the manufacturer's reasonable expectation of future custom is destroyed because the public is denied the opportunity to buy his goods.

The manufacturer of tobacco, like the producer of gasoline, is "vitally interested in putting his brand within easy reach of consumers" (Mr. Justice McREYNOLDS in *Federal Trade Commission v. Sinclair Refining Co.*, 261 U. S. 463, 475). The refusal of the manufacturer to sell his identified merchandise to the person who interferes with this vital interest where, if the interference is continued, disaster may result, is no more than a necessary step to protect his trade-mark property against damage by misuse calculated to destroy it. A practice such as this, like the infringement of a trade mark, is an interference with the manufacturer's good will of which his trade mark is the symbol: one destroys it and the other diverts it. Considering the sensitive nature of the property in trade marks, to move thus in self-defense seems entirely reasonable. As Mr. Justice HOLMES remarked in *Bourjois v. Katzel*, 260 U. S. 464-466:

"It (a trade-mark) deals with a delicate matter that may be of great value, but that easily is de-

stroyed, and therefore should be protected with corresponding care,"

The Court below said (Rec., 803):

"The examination of the testimony convinces us that what The American Tobacco Company is shown to have done is so far removed from constituting an unfair method of trade that it actually tended to promote fairness of trade and the suppression of unfairness in competition."

We think the Court was right. As Mr. Justice McREYNOLDS remarked in *Federal Trade Commission v. Curtis Publishing Co.* (260 U. S. 568, 582):

"Effective competition requires that traders have large freedom of action when conducting their own affairs."

We ask, therefore, that the decree below be affirmed.

Respectfully submitted,

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The American Tobacco Company.

SCHEDULE.

Findings of the Commission and Facts as to the Conduct of The American Tobacco Company.

If we understand the law, an order to cease and desist issued by the Federal Trade Commission, whatever the findings and whatever the facts, may properly require the respondent to cease and desist only from *improper conduct*, and we do not believe the order to cease and desist in this case can be justified, whatever the findings and whatever the facts. If The American Tobacco Co. does not enter into any agreement, express or tacit, with two or more of its jobbers, within or outside an association, it has a right to refuse to sell a jobber who persists in selling its goods at a price lower than the price made by those two jobbers, and this, whether or not the two jobbers have agreed on the price at which they shall sell,—*if*, in its judgment such lower price is so low that, if persisted in, it will injure the business of The American Tobacco Company. And it has this right whatever it may have done in Philadelphia in 1921.

We have difficulty with this record in arriving at the definite theory of the Commission as to the facts that, in its judgment, constitute a basis for the order to cease and desist. Commissioner VAN FLEET in his dissenting opinion states that the charge against The American Tobacco Company is that it "conspired with the Wholesale Dealers' Association to maintain prices" and he concludes that there is no evidence to support that charge. Perhaps he is right, and perhaps the Commission intended to find facts from which are to be deduced, as an ultimate finding, the fact that such a conspiracy existed. We look in vain, though, through the record for any such ultimate and specific finding.

The findings of fact and conclusion of the Commission are in the Record (715-723, fols. 1340 to 1357). Paragraphs one and two thereof (Rec., 717-721, fols. 1344 to 1352) seem devoted to findings against the Wholesale Dealers' Association and the jobber respondents, its members, paragraph four thereof (Rec., 723, fols. 1356, 1357) seems to constitute a general finding that the acts theretofore found had a tendency to induce uniformity of prices and therefore to suppress competition. We are compelled to believe that the findings that are supposed to be findings against The American Tobacco Company are set forth in paragraph three (Rec., 721-723, fols. 1353 to 1356). It is a very difficult undertaking to analyze this paragraph into findings of fact but we have attempted it by paralleling the Commission's findings with a statement of what we understand them to mean when expressed in explicit words instead of redundant and indefinite ones. It seems plain to us, also, that there is no relevant finding (that is one which can form a predicate for the order) that is not entirely unsupported by the testimony and there is no finding which has any support in the testimony which is not entirely irrelevant.

(1) Paragraph Three: During the period aforesaid in which the Association adopted and maintained uniform resale prices for said American Tobacco Company's products in the manner and by the means set out in Paragraph Two hereof, it was the general policy of said American Tobacco Company to assist groups of its jobbers who would fix or who had fixed by co-operation among themselves uniform re-sale

(1) During a given period it was the general policy of The American Tobacco Company (*not, so far as this finding is concerned, applicable to Philadelphia and its vicinity*) to assist groups of its jobbers in the maintenance of prices that these jobbers had fixed by co-operation among themselves, by refusing shipments of its goods to people who did not maintain these prices.

(*This is both irrelevant and unsupported by the*

prices on its products, by refusing shipments of its goods to such of its jobbers who had re-sold or who would re-sell at prices lower than those fixed by such jobbers by co-operation among one another.

(2) Such was the policy of said American Tobacco Company with respect to respondent Association and its Members. The representatives of said American Tobacco Company in the territory in which the Members re-sold its products were instructed by their superiors to carry out such policy in Philadelphia and vicinity and because of such instructions such representatives carried out such policy.

(3) Said American Tobacco Company knew of the price agreements made by the Association and its Members as described in Paragraph Two hereof

(4) And agreed with the said Association and its Members to help them maintain the price agree-

testimony. It is irrelevant because howsoever broad in territory an order to cease and desist based on proper evidence may be there must be evidence in accordance with the complaint and the complaint is limited to a recital of activities affecting *Philadelphia jobbers.*)

(2) That this policy was carried out by The American Tobacco Company in Philadelphia and its vicinity and that the representatives of The American Tobacco Company in this territory were instructed to carry out such policy.

(This is relevant but is unsupported by the Testimony.)

(3) The American Tobacco Company knew of the price agreements made by members of the Association.

(This is irrelevant and unsupported by the testimony.)

(4) The American Tobacco Company agreed with the Association and its members to help them

ments described in Paragraph Two hereof.

(5) Charles Seider, one of said American Tobacco Company's distributors in Philadelphia and a competitor of the Members, having declined an invitation of the president and treasurer of the respondent Association to join its membership, was urged by the Division Manager of the American Tobacco Company in charge of its Philadelphia territory, to join the Association. Said Division Manager requested said Seider to join the Association and not to sell at prices below those fixed by it and its Members, but to comply with the uniform prices put into effect by the Members and by the Association as described in Paragraph Two hereof.

(6) Said Seider refused to join the Association, or to abide by its prices, and the said American Tobacco Company, after investigating a complaint made to it by the Association and its Members that the said Seider was reselling its products at prices less than those fixed by the Association and its Members,

maintain the price agreement.

(This is relevant but unsupported by the testimony.)

^a (5) Charles Seider, a Philadelphia Jobber, was urged or requested, by the Division manager of The American Tobacco Company in charge of its Philadelphia territory, to join the Association and not to sell products at prices below those fixed by the Association.

(This is entirely irrelevant because The American Tobacco Company, as a company, cannot be held responsible for personal advice given by one of its salesmen. It is also, in fact, unsupported by the testimony.)

(6) Pressure was put on this jobber, Seider, by The American Tobacco Company to force him to join the Association by refusing to sell him goods, and the pressure was successful and he did join the Association and thereafter bought goods from The American Tobacco Company.

discontinued selling to said Seider in the period from April 20, 1921, to August 13, 1921, for the purpose of assisting the Association and its Members to maintain the price agreements as described in Paragraph Two hereof. After said Seider, following the suggestion made to him by the said Division Manager that if he joined respondent Association, it would help him to get the shipments that had been withheld from him by said American Tobacco Company, applied to the vice president of the respondent Association for membership therein, the said American Tobacco Company reinstated him as one of its customers and forwarded to him shipments that had been withheld in the period from April 20, 1921, to August 13, 1921.

(7) Respondents John Murphy and James Murphy, partners doing business under the name and style Murphy Brothers, were expelled from the Association in April, 1921, because they were accused by said Association of reselling at prices less than those fixed by the Association. The American Tobacco Company, after in-

(This is, perhaps, irrelevant and certainly unsupported by the testimony.)

(7) Murphy Bros., jobbers in and near Philadelphia were refused products of The American Tobacco Company, that penalty being for reselling The American Tobacco Company's products at prices less than those fixed by the Association, and for the purpose of assisting the Association and its members.

investigating complaints made to it by the Association that said Murphy Brothers were reselling its products at prices less than those fixed by the Association and its Members, discontinued selling said Murphy Brothers in the period from August 29, 1921, to October 4, 1921, for the purpose of assisting the Association and its Members in maintaining the prices which had been fixed as set out in Paragraph Two hereof.

(8) For the purpose of assisting the Association and its Members in maintaining the prices fixed by them as set out in Paragraph Two hereof, the American Tobacco Company in 1921, because of complaints made to it by the Association and its Members that respondents Fermani and Blumenthal were re-selling its products at prices less than those fixed by the Association and its Members, withheld shipments of its products to said Fermani and Blumenthal while it was investigating the prices at which Fermani and Blumenthal were re-selling its products.

(This is unsupported by any testimony and contradicted by all.)

(8) For the purpose of assisting the Association in maintaining the price, The American Tobacco Company withheld shipments of its products from Fermani & Blumenthal.

(This is entirely unsupported by even a shred of testimony.)

In this analysis and assumption that the findings directly applicable to The American Tobacco Company are contained in paragraph three of the findings, we are not inadvertent to some generalization in those paragraphs of the findings devoted to the jobbers and their Association, as for instance the finding that the Association and its members "sought and secured the co-operation of The American Tobacco Company" (Rec., 721, fol. 1352) which The American Tobacco Company rendered by circular letters that made certain implications "in veiled language," and again, that the members of the Association reported the names of price-cutters to The American Tobacco Company which report The American Tobacco Company proceeded to investigate, etc. (Rec., 721, fol. 1353). It remains true, however, so far as we can analyze the findings, that the foregoing is a fair statement of them, and that the Commission did not intend to make any distinct findings against The American Tobacco Company other than these.

Finding "T"—General Policy of The American Tobacco Company.

It is obvious from all of the testimony in the record that in the post war deflation of 1920-21 the business of tobacco jobbing had become peculiarly demoralized. The cut price situation had always caused complaint, sometimes justified and sometimes unjustified, but it never has been so serious, nor has seemed so real a menace to the business as in 1920-21. Jobbers complained against competitors whom they thought took an unfair advantage; they complained to the Federal Trade Commission itself; they were frequently making complaints to the manufacturers of tobacco.

The policy of The American Tobacco Company was publicly stated by a circular issued to all of its customers

under date of June 29, 1921 (Com. Ex. No. 10). The third paragraph of that circular is as follows:

"It is obvious that a jobber of our products who sells at prices which would not permit of the tobacco business itself being profitable or the business on our brands being profitable taken by itself, is a jobber who in the long run will be a detriment and not a benefit to our business as our customer."

It was expressly stated in the circular that The American Tobacco Company did not mean "price maintenance" but they did say that:

"* * * where a jobber * * * elects to sell our products, for motives of his own, at less than a living profit, we are forced to the conclusion that he is not sufficiently interested in our goods to make a desirable permanent customer."

This circular was sent in June, 1921, substantially a year after the formation of the Wholesale Tobacco Dealers Association of Philadelphia—therefore it is clear the circular did not induce the formation of that Association. The circular was not found by the Commission to be an illegal pronouncement or to threaten illegal conduct, but it is presumably referred to as "implying the same in veiled language," and the Commission mentions the letter as attempting to maintain (presumably in veiled language) "prices fixed in the aforesaid letter." It is perfectly obvious that no prices were fixed in the letter, and since the language is written, the Court may, as well as the Commission or counsel, determine whether there were veiled threats.

No one can doubt that The American Tobacco Company was acting independently and in its own interest. It is evident, we believe, that The American Tobacco Company is in business primarily for profit to itself. We

submit that it is not reasonable to assume that its officers would conspire with the jobber for the jobber's benefit merely. As between its officers taking lawful action for the company's own protection and taking action of doubtful legality to protect others—we submit the probability is on the side of the former. In Commission's Exhibit 18 (Rec., 221-222, fols. 415-416) it appears that the President of The American Tobacco Company would not cut off a "cut price house * * * *for they reach trade * * **"

The problem that confronted the jobber was not the same problem as the one that confronted the manufacturer. It was created by the same facts but it was not the same problem, nor was the remedy the same. The problem that confronted the jobber was the immediate one of making his bread and butter and keeping out of bankruptcy. The problem of the manufacturer was to maintain a sufficient number of satisfied customers—customers who were making enough money to induce them to keep on with the tobacco business—so that the products of The American Tobacco Company could be distributed rapidly through the jobber to the retailer and placed on the shelves of every retail store or stand in the United States where the consumer could get them.

It is quite clear, we believe, that the respondent had no purpose to discontinue the accounts of jobbers for reasons that seemed good to other jobbers but not to the respondent. It must not be overlooked, though, *that a price cutter who does business on a small margin of profit, or none at all, often becomes a bad business risk.* If a customer's account becomes a bad business risk, his account might be discontinued. If he is sound in most respects, but was over-extended, the holding of his orders until his account is reduced will serve the purposes of The American Tobacco Company's credit department. The attorneys for the Commission have throughout this

proceeding overlooked the fact that The American Tobacco Company sells its goods entirely on credit, and that the mere discontinuance of a customer's account, permanently or temporarily, or holding his orders for a time, does not necessarily indicate anything more than that the credit department has become concerned over the situation. A customer might be cut off for "sales reasons"—the real cause being that by selling at unduly low prices he has increased his volume of sales, but over-extended and thus weakened his credit. This would not mean a lack of generally sound financial standing or business ability. Such was the case with Murphy Brothers. It must not be forgotten that *unreasonably low prices are inextricably interwoven with credit conditions.*

A price war among jobbers might go on for a long time before it affected respondent, but it is quite clear that it affects respondent directly when, one jobber, or two jobbers, by selling at prices that give them little or no profit, begin to acquire in a volume which they cannot satisfactorily handle, the business of many other jobbers. The distribution of our goods is thus seriously interfered with, our outlets are reduced in number and we are deprived, against our will, of customers who are satisfactory to us and render us a service. It is clear that a jobber who tries to establish himself by such methods must be doing it at our expense. Why should we finance a jobber in a price-cutting war when he sells goods at a loss in order to get business away from our other customers and perhaps ruin them and drive them out of business? Why should we continue to ship goods on credit beyond a safe margin to the author of all this trouble?

Another piece of evidence, bearing on the general policy of The American Tobacco Company, was a letter introduced by counsel for the Commission, written on May 2, 1921, by George W. Hill, vice-President of The

American Tobacco Company, to Mr. Harry B. Finch of Minneapolis, Minnesota. In the Spring of 1921 certain correspondence occurred between Mr. Percival S. Hill and Mr. Finch; pending it, Mr. Percival S. Hill went abroad, and in his absence the correspondence was carried on by Mr. George W. Hill. Mr. Finch was a Minneapolis jobber who, so far as we know, never was in Philadelphia in his life. He had never sold goods there, and there is no sort of suggestion that the correspondence was ever communicated to anybody who ever sold goods in Philadelphia. So far as appears, Mr. Finch was a member of no association of any sort, but was a jobber who, like most jobbers in the Fall of 1920 and the Spring or 1921, was greatly disturbed at the very low profits that he was making. The prime importance of this correspondence, in the view of counsel for the Commission, lies in a sentence used by Mr. George W. Hill, in his letter of May 2, 1921, the last letter in the correspondence:

"We feel very definitely here that when jobbers have co-operated and have held such conferences as Mr. Hill has suggested, then the manufacturer can step in by refusing shipments or withholding orders from the demoralizers, and thereby assist those legitimate jobbers who desire to make a profit." (Rec., 682, fols. 1263-64.)

In order to make this testimony at all relevant to this case, there has to be something to connect it with the Philadelphia situation, because there is no charge in this case of any co-operation with Minneapolis jobbers or of inducing or being induced by Minneapolis jobbers to co-operate.

In the employ of The American Tobacco Company at Philadelphia in 1921 was Mr. Thomas F. O'Boyle, who never was an officer of the Company, and who at the time of his examination had actually left its employ. (Rec., 372, fol. 674.) To what extremities counsel for Commis-

sion must have been reduced to have sought to make this letter relevant and competent evidence in this proceeding by exhibiting it, written over the signature of a Vice-President of the Company, to Mr. O'Boyle and then asking him whether this letter stated the policy of the Company that prevailed in Philadelphia. It is to be noted, too, that this letter had other things in it than the sentence quoted—among them that no co-operative measures could be taken by The American Tobacco Company and other large manufacturers of tobacco, and that The American Tobacco Company would like always to have its tobacco distributors make living profits. (See Commission's Exhibit 32.) Mr. O'Boyle, having stated generally that the letter of Mr. Hill stated the policy of the Company in Philadelphia, while still on direct examination, made the following answer to a question of the Commission's counsel:

"There is a part of this letter that isn't in line with any policy, that I understood. First of all, and I will have to tell you what that is before I can go any farther, the part I did not understand is, 'We feel very definitely here that when jobbers have co-operated and have held such conferences as Mr. Hill has suggested', according to my knowledge of the policy there was no one connected with The American Tobacco Company who suggested that jobbers hold conferences". (Rec., 382, fols. 691-2.)

Besides the irrelevancy of this testimony let us look in all frankness at this Finch correspondence: In the first place, it all preceded the circular of June, 1921 (Commission's Exhibit No. 10), for that was dated and issued June 29, 1921, whereas the last letter of the Finch correspondence was that of Mr. George W. Hill of May 2, 1921. In the second place, one must consider this correspondence as a whole, beginning with the letter (American Tobacco Exhibit No. 1) from Mr. Finch, a

Minneapolis jobber, to Mr. Hill dated April 1, 1921, complaining of the cut price activities of three concerns, two located in Duluth, and one in Grand Falls, Minnesota. This letter was like a great many letters that officers of tobacco manufacturers were receiving, calling attention to the cut price situation, and earnestly asking aid of the manufacturer. Mr. Hill answered that letter, first by the truthful statement that he believed this disposition unduly to cut prices was injurious to his business, and, then he "passes the buck": first by inviting suggestions, and second by a suggestion—old as the hills—that the jobbers had better help themselves. In this letter of Mr. Hill (American Tobacco Exhibit No. 2) there occurs this phrase: "It does seem to me that a conference among jobbers themselves would do more to correct an evil of this kind than any other one method." On April 6th Mr. Finch wrote again to Mr. Hill suggesting a concurrent policy on the part of The American Tobacco Company, and Liggett & Meyers Tobacco Company and R. J. Reynolds Tobacco Company, competitors of The American Tobacco Company, not to sell to price cutters (American Tobacco Exhibit No. 3). In the meantime Mr. Hill had gone to Europe, and Exhibit No. 3 was left unanswered. On April 28th Mr. Finch, not having heard from Mr. Hill, wrote to find out why his letter of April 6th had not been answered (American Tobacco Exhibit No. 4). This letter was brought, in the absence of the President, Mr. Percival S. Hill, to the attention of the Vice-President, Mr. George W. Hill, and it was then that the correspondence first came to the attention of Mr. George W. Hill, and then that he wrote the letter of May 2, 1921 (Commission's Exhibit No. 32), of which the Commission's Counsel attempts to make so much. The letter of Mr. George W. Hill states the impossibility of co-operation between The American Tobacco Company and their competitors, and again "passes the buck," recommending the conferences that Mr. Percival S. Hill

had suggested, and those were the conferences referred to in The American Tobacco Company's Exhibit No. 2 already quoted.

In the whole files of The American Tobacco Company this is the only suggestion of conferences among the jobbers. It had no application to Philadelphia, and certainly was not influential there. So far as we know, it was not influential anywhere. It preceded the circular letter of June 29th, and was not a part of any policy there stated. It was a personal letter, written to a jobber who was apparently not a member of any association, and who, so far as appears, never acted upon it. The letter of Mr. George W. Hill did use the word "co-operating". If competition necessarily means hostility, then "co-operating" is an unfortunate word; but "co-operation" was found in *Frey v. Cudahy*, 256 U. S. 208, without unlawful agreement. Mr. Percival S. Hill has given a very frank explanation of his thought concerning conferences. In his testimony with respect to this Finch letter, he says:

"Q. How did you assume that conference among jobbers themselves would do more to correct an evil of this kind than any other one method? A. Well, I think I have stated that the prices and discounts in the selling of our merchandise varied in the different sections of the country on account of the expense involved in the distribution. Now, what those discounts shall be are usually adjusted, always from my experience, always adjusted by what you might call natural competition. Well, that is not by agreement, that is by the necessities of the case, and becomes, as a matter of course, unless those conditions are upset by what you might call unnatural competition, that is, false statements that are made either by one jobber to another or by the salesmen of one jobber about another salesman, and it has been my experience that a frank discussion as to the conditions of a business in a community eliminates

those rabid actions that are brought about by anger or jealousy, or something of that kind, and that if jobbers will get together and discuss their business, those unnatural methods of competition will be eliminated.

Q. Did you intend to suggest to Mr. Finch in this letter an agreement among jobbers fixing prices? A. Certainly not" (Rec., 421, fol. 763).

The foregoing testimony was on the examination of Mr. Hill by counsel on behalf of The American Tobacco Company, but his testimony in response to questions of the Commission's counsel casts no doubt on his sincerity and truthfulness:

"Q. Do you remember testifying on your cross examination, an observation of the advantages that jobbers might obtain by conferring with one another? A. I don't know as I put it just that way.

Q. Well, probably, you are correct you didn't put it that way—? A. Did I?

Q. Don't you remember suggesting that there was?— A. I remember suggesting that there was a real advantage in people talking things over.

Q. And I think you mentioned that one of the causes, among others, of dissatisfaction in the jobbing trade, was due to the fact, if my recollection is good, that a salesman of one jobber would say something about his employer's competitor, and that if the jobbers got together once in a while, those evils could be corrected; do you remember stating something to that effect on your cross examination? A. That is practically correct, yes.

Q. Now, are there any other advantages which jobbers might secure to themselves by getting together and conferring? A. I don't know what you mean by that. I cannot imagine people getting on good terms with one another but what there are a great many advantages that arise from it.

Q. You know one of them is the possibility of an agreed price, isn't there? A. Oh, well, that is your statement, it is not borne out by the facts.

Q. I say, that is a possibility? A. I don't know whether it is or not. I don't think you can get a body of jobbers that would agree to a price situation and maintain it, to save their souls.

Q. Do you think you could get them together to agree upon one? A. I don't know about that, I never tried" (Rec., 437, fols. 792, 793).

Finding "2"—Policy of The American Tobacco Company in Philadelphia and vicinity, and instructions to its sales representatives.

As already pointed out, the sales representatives of The American Tobacco Company in the Philadelphia territory repudiated any suggestion that any conferences among jobbers had been suggested by him. There is not a shred of evidence that any representative of The American Tobacco Company ever attended a meeting of the Philadelphia Association, formal or informal, or any conferences of jobbers.

Undoubtedly jobbers in Philadelphia, members of the Association and those not members, visited the offices of The American Tobacco Company. Some of these jobbers were on the stand and not one stated that he was advised or urged to join the Association. The testimony of Mr. Hill, the President of The American Tobacco Company, is as clear and definite as anything can be. He says, with reference to visits from the Philadelphia jobbers, as follows:

"Q. Mr. Hill, you have said in answer to the direct examination of Mr. Smith, that Mr. Eberbach undoubtedly visited you in 1921, and that you had no reason to deny that Mr. Krull visited you. Did you say to either of these gentlemen or both

together that The American Tobacco Company would support or co-operate with, or further the activities of, their Association? A. No, sir.

Q. In any way? A. Not at all.

Q. How do you know you never said that to them? A. I never said that to anybody; I could not have said it to them; it is not because I remember the conversation; I just know it did not happen.

Q. Because you never said it to any jobber? A. Yes" (Rec., 429, fols. 777, 778).

"Q. Now, Mr. Hill, did you in an interview in your office in 1921, 1920, or at any other time, advise or urge any member of the firm of Murphy Bros. to join any association of tobacco jobbers? A. I certainly did not.

Q. Did you advise him in words such as 'go along with the Association', or any other words indicating your desire that he should join or co-operate with the Association? A. No, sir.

Q. Why are you so positive in that statement? A. Because I never advised anybody to that effect. I always said we had nothing to do with them" (Rec. 423, fol. 766).

It will not be suggested that Mr. Eberbach or Mr. Krull contradicted this testimony of Mr. Hill's and certainly Mr. Murphy did not. He says, on his examination:

"Q. You saw Mr. Hill, President of The American Tobacco Company, in 1921? A. I presume I did; I was over there" (Rec. 260, fol. 480).

"Q. Did you tell Mr. Hill you were a member of the Association? A. I can't recall that" (Rec., 260, fol. 481).

"Q. Did Mr. Hill ask you anything about the Association? A. No, I think I told Mr. Hill about the Association.

Q. Did Mr. Hill . . . say . . . that you should go along with the Association? A. . . . I can't recall that, Counsel" (Rec., 261, fol. 482).

Mr. George W. Hill testified:

"Q. During the years 1920-1921, or at any other time, did you decline to sell any of your theretofore existing customers or decline to put on any applying new customers in and around Philadelphia or elsewhere, because of the request of any jobber or group of jobbers? A. We did not.

Q. Meaning The American Tobacco Company?

A. Meaning The American Tobacco Company did not." (Rec. 475, fol. 865.)

Finding "3"—The American Tobacco Company's Knowledge of Price Agreements.

This finding is to an extent true, but entirely irrelevant.

So far as the officers of the company are concerned, they knew of the existence of the Association of jobbers in Philadelphia, or at least Mr. Percival S. Hill, the President, did. He testified as follows:

"Q. Did you learn in 1921 that there were different organizations of jobbers being organized, or then organized, throughout the country? A. Yes, I heard that.

Q. Did you hear about the Milwaukee association? A. Well, I know I must have; I don't just recall the Milwaukee association.

Q. And the Cincinnati association? A. The same answer would apply.

Q. And the Philadelphia association? A. Yes, the same thing; I heard of it.

Q. . . . Did you hear that a majority of the jobbers serving the Philadelphia trade were allowing, at one time in 1920 and part of 1921, 8 per cent. off list price to their trade? A. I had heard that, yes.

Q. Where did you get that information, Mr. Hill? A. From our salesmen (Rec., 414, fol. 750).

Q. Now did you ever hear, or did you know, that the rate of discount from list price in Philadelphia changed from eight to seven? A. I heard that.

Q. And did you consider that price, that is net price, that 7 per cent. off list price, the prevailing and customary price for Philadelphia? A. I am not sure that I ever did, because I don't believe that—I don't remember. I don't remember whether that discount ever became effective or not; I mean, I don't know whether the majority of jobbers got those prices or not" (Rec., 415, fol. 751).

That is the kind of information that the officers of The American Tobacco Company had of the existence of an association and of its activities. There is not the slightest evidence that they knew when it was formed, how it was formed, what resolutions were passed, or who its officers were, and they did not even know when the jobbers changed their minimum price, if at all, from an 8 per cent. discount or a minimum margin to cover overhead and profit of 4 per cent., to a 7 per cent. discount, which gave a minimum margin of 5 per cent.

In this matter of knowledge, and lest a wrong impression shall be left with the Court, we will here discuss a bit of testimony that is unimportant save only as something on which suspicion might be hung. It appears that The American Cigar Company, engaged in the manufacture of cigars, is owned as to a majority of its stock by The American Tobacco Company, and it appears that until December 1921, American Cigar Company owned some stock in Dusel, Goodloe & Co., cigar jobbers (not engaged in the business of selling cigarettes or tobacco at all). It is to be remembered that the trade warfare in and around Philadelphia, and the activities of the association, had to do with tobacco and cigarette brands and not with cigar brands. It may be suggested that the membership of Dusel, Goodloe & Co. in this associa-

tion brought some knowledge of its affairs in a round-about way to The American Tobacco Company. There is not a word of testimony to justify any such inference and that such a result followed is definitely contradicted by the testimony of the President and Vice-President of The American Tobacco Company. Further, it appears that the jobbers' association, at ~~some~~ stage in the association's activities, entirely unknown to any officer of The American Tobacco Company, employed a man as an investigator and that that man, a Mr. Kane, had at one time been in the employ of Dusel, Goodloe & Co. It is definitely settled by Mr. Kane's own testimony that although he had been in the employ of Dusel, Goodloe & Co. he did not go from that company into the employ of the association but there intervened a period of six months after he had left Dusel, Goodloe & Co. before he thought of going with the association. (Rec., 65, 66, fol. 137). There is no suggestion of testimony that officers of The American Tobacco Company ever knew who this investigator was, or that there was an investigator at all.

Finding "4"—Agreeing with the Association to maintain prices.

There is nothing further to be said on this point. There is not a syllable of evidence to substantiate such a finding and evidence already set out in detail definitely and unequivocally contradicts it.

Finding "5"—Charles Seider urged to join the jobbers Association by a sales representative of The American Tobacco Company.

We have said, and repeat, that this is an irrelevant finding. It signifies nothing that a salesman, with no authority to commit the company in his personal rela-

tions with the jobbers in his territory, which are necessarily intimate and familiar, expresses one opinion or another as to what is wise for the jobber to do. Mr. O'Boyle, the salesman at Philadelphia, certainly had no authority to advise any jobber to join any association. Mr. Hill, President of The American Tobacco Company, testifies as follows, and is wholly uncontradicted.

"Q. Was anyone in the organization of The American Tobacco Company in 1920 or 1921, in Philadelphia or any other place, authorized to urge jobbers to join any association? A. No, sir.

Q. Were they authorized to advise that they join any association? A. No, sir.

Q. Were any of such representatives at any time authorized to represent to any jobbers that unless they followed the line or worked in with, or joined, any association, they would be liable to have trouble in getting goods? A. No, sir; not at all. We never recommended an association any place; we confined our transactions with our customers to them as individuals, and positively declined to recommend an association for any purpose" (Rec., 424, 425, fol. 769).

Moreover, though, Mr. O'Boyle, himself, is explicit in his denial of ever giving such advice to Mr. Seider:

"Q. Did you ever advise the Seiders to join the association? A. I never advised anyone to join the association" (Rec., 390, fol. 705).

The only testimony against this explicit statement concerns casual conversations between Mr. Seider and Mr. O'Boyle set forth by Mr. Seider as follows:

"Q. And Mr. O'Boyle the first time never said anything to you about joining the association at all, did he? A. No, sir.

Q. Didn't suggest that you should join it? A. No, sir" (Rec., 332, fol. 607).

"Q. Now the occasion of the next conversation with Mr. O'Boyle was about when, Mr. Seider? A. It followed after April 30th. * * *

Q. You say that at that time Mr. O'Boyle advised you to go along with the association? A. Yes, sir.

Q. Did Mr. O'Boyle say anything to you about the prices at which you were selling your products? A. No." (Rec., 332-3, fol. 607).

"Q. Then he did not suggest to you why you should join or should not join; is that true? A. He made no direct assertion that we should join—just made it as a suggestion, I took it." (Rec. 333, fol. 609).

How trivial all this is when, according to all the testimony Mr. Seider never joined the association and we would be justified in saying, for reasons to be stated later, was never invited to join, and never considered membership. Mr. Seider himself testifies:

"Q. Did you know that there was an association of tobacco jobbers in Philadelphia? A. I heard so.

Q. Were you a member of it? A. No, sir" (Rec., 296, fol. 544).

Finding "6"—Pressure put upon Seider by The American Tobacco Company that forced him to join or apply for membership in the Association.

The fact is, as just hereinabove stated, that Seider did not join the Association.

It is a fact, however, that The American Tobacco Company for about two months refrained from filling orders for Seider for perfectly valid reasons which had nothing to do with his membership or non-membership in the association. Mr. Seider testified:

"Q. Did you have any difficulty in getting your goods from The American Tobacco Company after that time? A. Yes, a little later on.

Q. When? A. I haven't got the exact date.

Q. What happened with respect to the shipment of your . . . orders given to The American Tobacco Company, two months later? A. What happened?

Q. Yes. A. I simply didn't get them. Didn't receive any goods.

Q. How long a period was it that your orders were not filled by The American Tobacco Company? A. About two months" (Rec., 299, fol. 550).

It so happened that Seider had difficulty for six months in getting goods from P. Lorillard Company—and yet the Federal Trade Commission has dismissed this complaint as to the P. Lorillard Company. Mr. Seider testified in that regard:

"Q. Did you ever have any difficulty in having your orders accepted by the Lorillard Tobacco Company? A. Yes, sir.

Q. When? A. I can't say the exact date. It was started possibly in March or April.

Q. 1921? A. Yes.

Q. How long did that continue? A. About—nearly six months" (Rec., 299-300, fol. 551).

Still referring to Mr. Seider's testimony for our evidence, what do we find as to his beginning to get goods from The American Tobacco Company? It is to be remembered that he was still not a member of the association and still selling The American Tobacco Company's goods at ten and one per cent. off the list, thus leaving him the ridiculously low net profit of one per cent., which certainly would not pay his expenses (see Mr. Seider's

testimony, Rec., 331, fol. 605); Mr. Seider further testified:

"Q. So that after July 12, 1921, The American Tobacco Company sent goods to you no matter what your price was? A. Yes, sir.

Q. And you never made any promise as to what price you were to sell your goods? A. No.

Q. Neither did The American Tobacco Company ever exact from you any promise or agreement as to what prices you would sell your goods? A. No.

Q. And never gave you any orders about selling your goods at any particular price? A. No.

Q. That is true? A. Yes" (Rec. 331-2, fols. 605, 606).

Now what are the further facts with regard to Mr. Seider as developed by this testimony? He was primarily a cigar manufacturer who sold his own cigars at retail. He also did a small jobbing business. Suddenly (and obviously, because most Philadelphia jobbers were attempting to make a legitimate profit) his purchases and sales increased twelve-fold. He was buying from The American Tobacco Company at ten per cent. off the list, trade discount, plus two per cent. off the list for cash, and selling at ten off—a price at which he could not make a living and which was of course induced only by his desire to place more of his own cigars. Why should he use his cigar business to finance a trade war against the regular jobbing customers of The American Tobacco Company? Why should he be permitted to jeopardize, financially, his account by suddenly increasing his purchases only to sell goods at a loss? This testimony is not the testimony only of The American Tobacco Company officers, but Mr. Seider himself admits it.

"Q. Isn't it the fact that in the first four months of 1921 you ordered from the Lorillard Tobacco Company as many goods as you ordered

during the entire four preceding years? A. Possibly; I can't say exactly.

Q. That is about right according to your best recollection? A. Yes" (Rec., 307, fol. 562).

"Q. Can you tell us what the general run (of your prices) was? A. We were selling from five per cent. up to ten per cent.

Q. That means ten per cent. off, does it not? A. Yes.

Q. Wasn't the bulk of it ten per cent. off? A. The bulk?

Q. Wasn't the bulk of the sales ten per cent. off during the first four months of 1921? * * *

A. Well, possibly.

Q. That is about right, isn't it? A. Pretty near right" (Rec., 307-8, fol. 563).

"Q. You are a cigar manufacturer? A. Yes.

Q. What help do you have in the manufacture of cigars? A. Why, twenty-five hands down to five hands (Rec., 309, fol. 566).

Q. What else do you sell besides cigars? A. Tobaccos, cigarettes, pipes, smokers mixtures in general.

Q. How does your cigarette business compare with your cigar business? A. I pay more attention to the cigar business? * * *

Q. That is your principal business, pushing your cigar business? A. Yes, sir" (Rec., 309-10, fols. 566, 567).

Mr. Seider testified that the same facts applied to the sale of The American Tobacco Company's brands as to P. Lorillard Company's (Rec. 308-9, fols. 564-565).

Finding "7"—Conduct of the American Tobacco Company in refusing to sell its products to Murphy Bros.

Explicit testimony has already been quoted that no officer of The American Tobacco Company had urged

or advised Murphy Bros. to join the Association. The fact is, as appears by this testimony, although utterly unknown to the officers of The American Tobacco Company, that Murphy Bros. were members of the Association and that they and other members of the Association engaged in criminations and recriminations with respect to price-cutting. Why did The American Tobacco Company, from time to time, refuse to sell Murphy Bros. its products? The testimony of Mr. Hill is definite:

"Q. Why were they (Murphy Bros.) cut off when they were cut off? A. They were cut off for credit reasons" (Rec., 424, fol. 767).

As against this explicit testimony of Mr. Hill there is, among the exhibits, the office memorandum of The American Tobacco Company that is taken to indicate that Murphy Bros. were cut off from the direct buying list for sales reasons. The fact is, of course, that the credit and selling reasons are frequently closely intertwined and that the fact that Murphy Bros.' selling prices were so low as to make impossible any profit reacted necessarily on their credit condition. Mr. Hill's testimony is an entirely frank discussion of it, in every way corroborated by Mr. Murphy. Mr. Hill testifies:

"Q. What was the average condition of their account during 1921 (referring to Murphy Bros.)?
 * * * A. Well, they owed us at various times during 1921—oh, anywhere from eighteen to thirty-five thousand dollars.

Q. Did you have interviews with members of the firm, one or both, as to the condition of their account? A. Yes, sir; several.

Q. Did you hear during 1921 that they were selling goods at a very low price? A. Yes, I heard that they were selling goods less 10 and 15% and we allowed them 10 and 2.

Q. That gave them a gross profit of— A. One per cent.

Q. Is your familiarity with the tobacco business sufficient to enable you to give an opinion as to whether that enables one to pay his expenses?
A. It can't be done.

Q. In your discussions with one of those members of the firm of Murphy Bros., your discussions during 1920 and 1921, did you refer to that low price they were making, * * * A. Yes, sir.

Q. Where did you get your information that they were making that low price? A. I got it from our salesmen.

Q. How did you discuss that low price they were making with respect to their credit condition, or were the two discussed together? A. They were practically discussed together, that they owed us so much money; they were not paying their bills promptly, and how could they expect to continue in business at a profit, selling their goods on a one per cent. margin.

Q. And according to your recollection during the period of 1919, 1920 and 1921, they were, for those reasons, off the list two or three times? A. Yes, sir" (Rec., 424, fols. 767-9).

Mr. Murphy in no way contradicts a word of this testimony and his testimony, so far as it goes at all, is in corroboration.

"Q. Can you tell us within \$5,000 the amount of your indebtedness to The American Tobacco Company on open account? A. I might say about \$15,000" (Rec. 265, fol. 489).

Incidentally Mr. James Murphy did not know that Murphy Brothers had been "dropped from the list of The American Tobacco Company" (Rec. 264, fol. 487). He carried "a pretty good stock" (Rec. 264, fol. 487).

While the Commission's finding indicates The American Tobacco Company discontinued selling Murphy Brothers for about five weeks they have overlooked the fact testified to by James Murphy that exactly in the middle of that period a shipment ordered two and one-half weeks before was received (Rec. 228, fol. 429).

Finding "8"—Conduct of The American Tobacco Company towards Fermani and Blumenthal.

This finding, better than anything else in this record, demonstrates the infinitesimal littleness of testimony that seems to satisfy the Commission and induces it to make solemn findings against respondent. The finding is that, for the purpose of assisting the Association in maintaining prices, and because of complaints made to it by the Association and its members that these two jobbers (Fermani and Blumenthal) were reselling products of The American Tobacco Company at prices less than those fixed by the Association, The American Tobacco Company withheld shipments from them. No officer of the American Tobacco Company ever admitted having any complaints from the Association or any of its members as to the conduct of Fermani or Blumenthal. No member of the Association testified to ever making such complaints. Mr. Fermani was on the stand as a witness for the Commission and he gave no testimony as to any threats or the withholding of his orders. Mr. Blumenthal was not called as a witness by anybody. The sole testimony that we are able to find in this record bearing on the question at all is the following from the testimony of Mr. O'Boyle, a salesman who was employed in Philadelphia during 1921:

"Q. Were there any jobbing firms in Philadelphia outside of Seider Brothers and Murphy Brothers who were cut off, whose shipments were held up by The American Tobacco Company during the period that you were field sales manager for The American Tobacco Company in Philadelphia? A. Yes.

Q. What were those firms, what were the names of those firms? A. One was Fermani, the other was Blumenthal.

Q. Anyone else? A. I think that is all.

Q. Gordesky? A. No.

Q. Did you ever investigate or have anyone under you investigate the prices at which Fermani was selling or the discounts he was allowing?

A. No, sir.

Q. What do you say as to Blumenthal? A. No, sir.

Q. From whom did you get your information that Fermani's shipments were being held up by The American Tobacco Company? A. From Mr. Fermani.

Q. And from whom did you get the information that Blumenthal's shipments were being held up? A. I think it was Mr. Blumenthal.

Q. Did you get that information as to Fermani from anybody other than Fermani? A. I do not remember.

Q. What did you do when you were told by Fermani that his shipments were being held up? Did you take it up with your company? A. I think I did, yes, sir.

Q. When Fermani told you shipments were being held up, did he tell you why they were being held up? A. I do not think he did.

Q. What information did you get from the American Tobacco Company when you reported that Fermani had told you that his shipments were being held up? A. I think I was instructed not to bother very much about it.

Q. Who gave you those instructions? A. I do not remember any individual.

Q. Was it somebody connected officially or in an executive capacity with The American Tobacco Company? A. I think it was, yes.

Q. What was said to you by your superiors when you reported that Blumenthal said that his shipments were being held? A. I think his shipments came forward immediately.

Q. When you reported to the Company that Blumenthal had told you that his shipments were being held up, what did The American Tobacco Company tell you, if anything? A. I think they said that the shipments would go forward at once" (Rec., 386-7, fols. 697-8).

We have said this is the only testimony, and that is true. Mr. Hill on his examination by counsel for the Commission was asked:

"Q. What did you say was the reason, or did you give a reason, for the withholding of shipments to Fermani of Philadelphia? A. I did not give you the reason, and I cannot tell you now what it was" (Rec., 435, fol. 788).

"Q. Do you recall with respect to either of these last mentioned, Charles Seider or B. Fermani, whether you heard of their increased business or their selling goods at what you deemed very low cost? A. No, sir; I don't remember that" (Rec., 426, fol. 772).

Further comment is unnecessary.

The Commission's Dismissal of Its Complaint Against P. Lorillard Company.

The complaint in this case was originally filed against the Wholesale Tobacco and Cigar Dealers' Association of Philadelphia and certain persons connected with it, charging them as officers, directors and members, The American Tobacco Company and P. Lorillard Company. The charges against The American Tobacco Company and P. Lorillard Company are the same, and are included in the same paragraph of the complaint (Rec., 6) where these companies are referred to as the "Respondent Manufacturers". Both answered. Testimony was taken with respect to each, and the Trial Examiner's findings included both (Rec., 757, 760-4). Much more space is devoted to the activities of P. Lorillard Company than to those of The American Tobacco Company. Its circular letters are set out in full (Rec., 760-2, Paragraph Six; Rec., 762, Paragraph Seven; Rec., 764).

The Seider incident, which has been referred to with respect to The American Tobacco Company was duplicated with P. Lorillard Company, but The American Tobacco Company is found to have refused Seider any of its products from April 30th to July 12th, 1921 while the Lorillard Company refused to furnish him goods from April 5th to November 1, 1921 (Rec., 763). With respect to the Lorillard Company, the Examiner, referring to Seider, states, "In the meantime this old customer of Lorillard Company was pleading to have his orders filled" (Rec., 763). However, the Commission, for some reason not apparent to us, dismissed its complaint against P. Lorillard Company (Rec., 715), making no findings of fact with respect to it although making findings against The American Tobacco Company and entering an order to cease and desist against it. This discrimination, without apparent reason, was vigorously commented upon by Commissioner Van Fleet in his dissent (Rec. 726) where he said,

"The Commission dismissed the case against the Lorillard Company for lack of proof and I believe that eliminating evidence of acts of others for which the American Company was in no wise responsible and discarding mere conjecture, there is not proof to warrant an order against the American Company."

This action is mentioned by the Circuit Court of Appeals (Rec., 790), the actions of the Lorillard Company are commented on (Rec., 792) and the dissent of Commissioner Van Fleet is quoted by the Court with approval (Rec., 804).

It is evident that in dismissing its complaint against the Lorillard Company, the Commission decided that its methods of competition were not unfair, and as there is no distinction apparent to us between the methods of the Lorillard Company and The American Tobacco Company, it seems clear to a demonstration that if the

methods of the Lorillard Company were not unfair, the methods of The American Tobacco Company also were not unfair. Therefore, on a question of fact, the Circuit Court of Appeals, one Commissioner expressly, and three by implication, have held that the methods of The American Tobacco Company, as disclosed by this record, are fair methods of competition and not in violation of the Federal Trade Commission Act. It would seem that, under such circumstances, this Court would be disinclined to investigate a record of over 800 pages to arrive at a different conclusion on a question of fact.

had to be bought and paid for separately from the wheat, or separated and returned to the seller. A license was necessary to operate an elevator, for which a charge was made according to the capacity of the elevator. Every elevator operator "buying or shipping for profit" who did not pay cash in advance was required to give a bond. A buyer was required to keep a record of wheat bought and to show therein the price paid and the grades given, and "the price received and the grades received at the terminal market," which information was made available to the supervisor. Again we find an act directly regulating and burdening interstate commerce.

Respectfully submitted,

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Attorneys for Defendant in Error.

Has transcript of Record been filed? ✓

SUPREME COURT OF THE UNITED STATES.

No. 279.—OCTOBER TERM, 1926.

Federal Trade Commission, Petitioner,	}	On Writ of Certiorari to
<i>vs.</i>		the United States Circuit
American Tobacco Company.		Court of Appeals for the Second Circuit.

[May 31, 1927.]

Mr. Justice McREYNOLDS delivered the opinion of the Court.

The statement of the petition for certiorari that the judgment and opinion below might seriously hinder future administration of the law was grave and sufficiently probable to justify issuance of the writ.

Proper decision of the controversy depends upon a question of fact. Did the American Tobacco Company become party to the unlawful combination of tobacco jobbers at Philadelphia to maintain prices? After considering much evidence the Commission gave affirmative answer to that query; but the Circuit Court of Appeals thought there was nothing to support their view. 9 Fed. (2d) 570.

It now appears to us that this matter of fact is of no general importance. Accordingly, we adhere to the usual rule of non-interference where conclusions of Circuit Courts of Appeals depend on appreciation of circumstances which admit of different interpretations. And upon that ground alone we affirm the judgment below.

The opinion of the Circuit Court of Appeals is of uncertain intentment and is not satisfactory as an exposition of the law. What this Court has said in many opinions indicates clearly enough the general purpose of the statute and the necessity of applying it with strict regard thereto.

Affirmed.